DRAFT REGULATORY CHECKLIST/CROSSWALK

for

ANALYZING OREGON'S AUTHORITY TO ASSUME THE CWA SECTION 404 PROGRAM

Oregon's existing removal-fill permitting program heavily overlaps with the requirements of Section 404 of the Clean Water Act (CWA). Oregon's assumption strategy is …….

Commented [PB1]: I am not sure what to write here. look at the Florida model and come up with something.

Code of Federal Regulations

Title 40 – Protection of Environment
Part 232-404 PROGRAM DEFINITIONS; EXEMPT ACTIVITIES NOT REQUIRING 404 PERMITS:
~~Definitions and exemptions in **40 C.F.R. § 232** which apply to state-administered programs after program approval.~~

Commented [PB2]: I crossed this out but didn't delete it so Eric and Jesse (DOJ) can approve it.

§ 232.2 Definitions
~~(Act means Clean Water Act)~~

Commented [PB3]: I don't think we need this. Intuitive.

Federal Authority Citation and Language of Federal Authority	Corresponding State Authority Citation	Language of State Authority	Comments
Discharge of dredged material. (1) Except as provided below in paragraph (2), the term *discharge of dredged material* means any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States. The term includes, but is not limited to, the following: (i) The addition of dredged material to a specified discharge site located in waters of the United States; (ii) The runoff or overflow, associated with a dredging operation, from a contained land or water disposal area; and (iii) Any addition, including redeposit other than incidental fallback, of dredged material, including excavated material, into waters of the United States which is incidental to any activity,	ORS 196.800(13)	"Removal" means: **(a)** The taking of more than 50 cubic yards or the equivalent weight in tons of material in any waters of this state in any calendar year; **or** **(b)** The movement by artificial means of an equivalent amount of material on or within the bed of such waters, including channel relocation.	"Removal" as relating to "dredged"
	ORS 196.800(8)	"Material" means rock, gravel, sand, silt and other inorganic substances, and large woody debris, removed from waters of this state and any materials, organic or inorganic, used to fill waters of this state.	
	ORS 196.800(15)	"Waters of this state" means all natural waterways, tidal and nontidal bays, intermittent streams, constantly flowing streams, lakes,	

Commented [PB4]: I highlighted some of these terms in green to show the definition, as the words are not the same sometimes!

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including mechanized landclearing, ditching, channelization, or other excavation. (2) The term *discharge of dredged material* does not include the following: (i) Discharges of pollutants into waters of the United States resulting from the onshore subsequent processing of dredged material that is extracted for any commercial use (other than fill). These discharges are subject to section 402 of the Clean Water Act even though the extraction and deposit of such material may require a permit from the Corps or applicable state. (ii) Activities that involve only the cutting or removing of vegetation above the ground (e.g., mowing, rotary cutting, and chainsawing) where the activity neither substantially disturbs the root system nor involves mechanized pushing, dragging, or other similar activities that redeposit excavated soil material. (iii) Incidental fallback. (3) Section 404 authorization is not required for the following: (i) Any incidental addition, including redeposit, of dredged material associated with any activity that does not have or would not have the effect of destroying or degrading an area of waters of the U.S. as defined in paragraphs (4) and (5) of this definition; however, this exception does not apply to any person preparing to undertake mechanized landclearing, ditching, channelization and other excavation activity in a water of the United States, which would result in a redeposit of dredged material, unless the person demonstrates to the satisfaction of the Corps, or EPA as appropriate, prior to commencing the activity		wetlands, that portion of the Pacific Ocean that is in the boundaries of this state, all other navigable and nonnavigable bodies of water in this state and those portions of the ocean shore, as defined in ORS [HYPERLINK "https://www.oregonlaws.org/ors/390.605"], where removal or fill activities are regulated under a state-assumed permit program as provided in 33 U.S.C. 1344(g) of the Federal Water Pollution Control Act, as amended.	"Waters of this state" as relating "waters of the United States"
	ORS 390.605(2) ORS 196.800(3)	"Ocean shore" means the land lying between extreme low tide of the Pacific Ocean and the statutory vegetation line as described by ORS [HYPERLINK "https://www.oregonlaws.org/ors/390.770"] or the line of established upland shore vegetation, whichever is farther inland. "Ocean shore" does not include an estuary as defined in ORS [HYPERLINK "https://www.oregonlaws.org/ors/196.800"].	"Ocean shore" as relating to ORS onshore"
		"Fill" means the total of deposits by artificial means equal to or exceeding 50 cubic yards or more of material at one location in any waters of this state.	

involving the discharge, that the activity would not have the effect of destroying or degrading any area of waters of the United States, as defined in paragraphs (4) and (5) of this definition. The person proposing to undertake mechanized landclearing, ditching, channelization or other excavation activity bears the burden of demonstrating that such activity would not destroy or degrade any area of waters of the United States. (ii) Incidental movement of dredged material occurring during normal dredging operations, defined as dredging for navigation in *navigable waters of the United States*, as that term is defined in 33 CFR § 329, with proper authorization from the Congress or the Corps pursuant to 33 CFR § 322; however, this exception is not applicable to dredging activities in wetlands, as that term is defined at § 232.2(r) of this chapter. (iii) Certain discharges, such as those associated with normal farming, silviculture, and ranching activities, are not prohibited by or otherwise subject to regulation under Section 404. See 40 CFR 232.3 for discharges that do not require permits.(4) For purposes of this section, an activity associated with a discharge of dredged material destroys an area of waters of the United States if it alters the area in such a way that it would no longer be a water of the United States~~. Note: Unauthorized discharges into waters of the United States do not eliminate Clean Water Act jurisdiction, even where such unauthorized discharges have the effect of destroying waters of the United States.~~

Commented [PB5]: Don't think "Note"s are needed

(5) For purposes of this section, an activity associated with a discharge of dredged material degrades an area of waters of the United States if it has more than a *de minimis* (*i.e.*, inconsequential) effect on the area by causing an identifiable individual or cumulative adverse effect on any aquatic function.			
Discharge of fill material. (1) The term *discharge of fill material* means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure or infrastructure in a water of the United States; the building of any structure, infrastructure, or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, or other uses; causeways or road fills; dams and dikes; artificial islands; property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; placement of fill material for construction or maintenance of any liner, berm, or other infrastructure associated with solid waste landfills; placement of overburden, slurry, or tailings or similar mining-related materials;" after the words "utility lines; and artificial reefs. (2) In addition, placement of pilings in waters of the	ORS 196.800(3)	See "Fill", "Material", "Waters of the United States", above	

Commented [PB7]: Lani, ensure all the words are covered above or we will need to add definitions here.

United States constitutes a discharge of fill material and requires a Section 404 permit when such placement has or would have the effect of a discharge of fill material. Examples of such activities that have the effect of a discharge of fill material include, but are not limited to, the following: Projects where the pilings are so closely spaced that sedimentation rates would be increased; projects in which the pilings themselves effectively would replace the bottom of a waterbody; projects involving the placement of pilings that would reduce the reach or impair the flow or circulation of waters of the United States; and projects involving the placement of pilings which would result in the adverse alteration or elimination of aquatic functions. (i) Placement of pilings in waters of the United States that does not have or would not have the effect of a discharge of fill material shall not require a Section 404 permit. Placement of pilings for linear projects, such as bridges, elevated walkways, and powerline structures, generally does not have the effect of a discharge of fill material. Furthermore, placement of pilings in waters of the United States for piers, wharves, and an individual house on stilts generally does not have the effect of a discharge of fill material. All pilings, however, placed in the *navigable waters of the United States,* as that term is defined in 33 CFR § 329, require authorization under section 10 of the Rivers and Harbors Act of 1899 (see 33 CFR § 322).			

Dredged Material means material that is excavated or dredged from waters of the United States.			
Fill Material (1) Except as specified in paragraph (3) of this definition, the term fill material means material placed in waters of the United States where the material has the effect of: (i) Replacing any portion of a water of the United States with dry land; or (ii) Changing the bottom elevation of any portion of a water of the United States.(2) Examples of such fill material include, but are not limited to: rock, sand, soil, clay, plastics, construction debris, wood chips, overburden from mining or other excavation activities, and materials used to create any structure or infrastructure in the waters of the United States. (3) The term fill material does not include trash or garbage.			
General permit means a permit authorizing a category of discharges of dredged or fill material under the Act. General permits are permits for categories of discharge which are similar in nature, will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.	ORS 196.800(5) ORS 196.800(5) & 196.817(1)	"General permit" means a permit for removal activities or fill activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes. **LEG. CONCEPT:** "General permit" means a permit developed pursuant to ORS 196.817 that is issued: (a) On a statewide or geographical basis; or (b) For removal activities or fill activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes. (1)(a) Notwithstanding ORS 196.810, the Department of State Lands may establish a removal or fill general permit: (A) By rule for processing applications on a	Legislative concept: amends the current definition and amends standards for issuing general permits.

Commented [PB9]: Eric will need to add language on the DSL General Permit as I don't know about it.

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		statewide or geographic basis; or (B) By order for an applicant or group of applicants to cover activities that are substantially similar in nature, are recurring or ongoing, and have predictable effects and outcomes. (b) The department must find that the project is in compliance with the review standards set forth in ORS 196.600 to 196.905 and would not result in long-term harm to water resources of this state. A project would not result in long-term harm to water resources of this state if the project will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. (c) The department shall condition any such general permit upon actions necessary to minimize environmental effects.	

§ 232.3 Activities not requiring permits.

Federal Authority Citation and Language of Federal Authority	Corresponding State Authority Citation	Description	Comments
Except as specified in paragraphs (a) and (b) of this section, any discharge of dredged or fill material that may result from any of the activities described in paragraph (c) of this section is not prohibited by or otherwise subject to regulation under this part. (a) If any discharge of dredged or fill material resulting from the activities listed in paragraph (c) of this section contains any toxic pollutant listed under section 307 of the Act, such discharge shall be subject to any applicable toxic effluent standard or prohibition and shall	ORS 196.905 Applicability?	Oregon does not have a recapture provision for toxic effluent. **LEG. CONCEPT**: Added recapture provision: Notwithstanding the exemptions in this section, a permit under ORS 196.600 to 196.905 is required for any fill or removal of material in or from the waters of this state even? if the material contains any toxic pollutant listed under 33 U.S.C. 1317, Section 307 of the Federal Water Pollution Control Act, as amended.	Legislative concept: amends list of exemptions to include a recapture provision for toxics.

Commented [PB10]: Lani I have not verified these statutes as the correct references. Could you please?

require a section 404 permit. (b) Any discharge of dredged or fill material into waters of the United States incidental to any of the activities identified in paragraph (c) of this section must have a permit if it is part of an activity whose purpose is to convert an area of the waters of the United States into a use to which it was not previously subject, where the flow or circulation of waters of the United States may be impaired or the reach of such waters reduced. Where the proposed discharge will result in significant discernable alterations to flow or circulation, the presumption is that flow or circulation may be impaired by such alteration. (c) The following activities are exempt from section 404 permit requirements, except as specified in paragraphs (a) and (b) of this section: (1)(i) Normal farming, silviculture and ranching activities such as plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices, as defined in paragraph (d) of this section.(ii)(A) To fall under this exemption, the activities specified in paragraph (c)(1) of this section must be part of an established (*i.e.*, ongoing) farming, silviculture, or ranching operation, and must be in accordance with definitions in paragraph (d) of this section. Activities on areas lying fallow as part of a conventional rotational cycle are part of an established operation. (B) Activities which bring an area into farming, silviculture or ranching use are not part of an established operation. An operation ceases to be established when the area in which it was	ORS 196.905(1) ORS 196.905(7)	Exempts fill/removal activities on lands zoned for EFU if for drainage or maintenance of farm or stock ponds, or if for maintenance of farm roads that are constructed and maintained in accordance with construction practices designed to minimize any adverse effects to the aquatic environment and the borrow material does not come from waters of this state without authorization from DSL and maintenance activities are confined to the scope of construction for the original project. **CURRENTLY:** Exemptions in (3) to (6) and (8) do not apply if the purpose of the fill/removal activity is to bring an area of state waters into a new use, and it impairs flow or circulation or reduces the reach of state waters. **LEG. CONCEPT:** Expanded the recapture: Notwithstanding the exemptions this section, a permit under ORS 196.600 to 196.905 is required for any fill or removal of material in or from the waters of this state when: (a) The fill or removal is a part of an activity whose purpose is to bring an area of state waters into a use to which it was not previously subject; and (b)(A) The flow or circulation of the waters of this state may be impaired; or (B) The reach of the waters may be reduced. **CURRENTLY:** Exemptions in (3) to (6) do not apply if the fill/removal involves changing an area of wetlands or converted wetlands to a nonfarm use.	Legislative Concept amends the list of exemptions so that this recapture provision applies to all exemptions in ORS 196.905. Legislative Concept amends the list of exemptions so that this recapture

conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operation. If an activity takes place outside the waters of the United States, or if it does not involve a discharge, it does not need a section 404 permit whether or not it was part of an established farming, silviculture or ranching - operation.(2) Maintenance, including emergency reconstruction of recently damaged parts, of currently serviceable structures such as dikes, dams, levees, groins, riprap, breakwaters, causeways, bridge abutments or approaches, and transportation structures. Maintenance does not include any modification that changes the character, scope, or size of the original fill design. Emergency reconstruction must occur within a reasonable period of time after damage occurs in order to qualify for this exemption. (3) Construction or maintenance of farm or stock ponds or irrigation ditches or the maintenance (but not construction) of drainage ditches. Discharge associated with siphons, pumps, headgates, wingwalls, weirs, diversion structures, and such other facilities as are appurtenant and functionally related to irrigation ditches are included in this exemption. (4) Construction of temporary sedimentation basins on a construction site which does not include placement of fill material into waters of the United States. The term "construction site" refers to any site involving the erection of buildings, roads, and other discrete structures and the installation of support facilities necessary for construction and utilization of such structures. The term	ORS 196.90598)	**LEG. CONCEPT:** Expanded the recapture. The exemptions in this section do not apply to any fill or removal that involves changing an area of wetlands or converted wetlands to a nonfarm use.	provision applies to all exemptions in ORS 196.905.

also includes any other land areas which involve land-disturbing excavation activities, including quarrying or other mining activities, where an increase in the runoff of sediment is controlled through the use of temporary sedimentation basins. (5) Any activity with respect to which a State has an approved program under section 208(b)(4) of the Act which meets the requirements of section 208(b)(4)(B) and (C). (6) Construction or maintenance of farm roads, forest roads, or temporary roads for moving mining equipment, where such roads are constructed and maintained in accordance with best management practices (BMPs) to assure that flow and circulation patterns and chemical and biological characteristics of waters of the United States are not impaired, that the reach of the waters of the United States is not reduced, and that any adverse effect on the aquatic environment will be otherwise minimized. The BMPs which must be applied to satisfy this provision include the following baseline provisions:(i) Permanent roads (for farming or forestry activities), temporary access roads (for mining, forestry, or farm purposes) and skid trails (for logging) in waters of the United States shall be held to the minimum feasible number, width, and total length consistent with the purpose of specific farming, silvicultural or mining operations, and local topographic and climatic conditions;(ii) All roads, temporary or permanent, shall be located sufficiently far from streams or other water bodies (except for portions of such roads which must cross water bodies) to minimize			

discharges of dredged or fill material into waters of the United States;(iii) The road fill shall be bridged, culverted, or otherwise designed to prevent the restriction of expected flood flows;(iv) The fill shall be properly stabilized and maintained to prevent erosion during and following construction;(v) Discharges of dredged or fill material into waters of the United States to construct a road fill shall be made in a manner that minimizes the encroachment of trucks, tractors, bulldozers, or other heavy equipment within the waters of the United States (including adjacent wetlands) that lie outside the lateral boundaries of the fill itself;(vi) In designing, constructing, and maintaining roads, vegetative disturbance in the waters of the United States shall be kept to a minimum;(vii) The design, construction and maintenance of the road crossing shall not disrupt the migration or other movement of those species of aquatic life inhabiting the water body;(viii) Borrow material shall be taken from upland sources whenever feasible;(ix) The discharge shall not take, or jeopardize the continued existence of, a threatened or endangered species as defined under the Endangered Species Act, or adversely modify or destroy the critical habitat of such species;(x) Discharges into breeding and nesting areas for migratory waterfowl, spawning areas, and wetlands shall be avoided if practical alternatives exist;(xi) The discharge shall not be located in the proximity of a public water supply intake;(xii) The discharge shall not occur in areas of concentrated shellfish - production;(xiii) The discharge shall not occur			

in a component of the National Wild and Scenic River System;(xiv) The discharge of material shall consist of suitable material free from toxic pollutants in toxic amounts; and(xv) All temporary fills shall be removed in their entirety and the area restored to its original elevation.(d) For purpose of paragraph (c)(1) of this section, cultivating, harvesting, minor drainage, plowing, and seeding are defined as follows:(1) Cultivating means physical methods of soil treatment employed within established farming, ranching and silviculture lands on farm, ranch, or forest crops to aid and improve their growth, quality, or yield.(2) Harvesting means physical measures employed directly upon farm, forest, or ranch crops within established agricultural and silvicultural lands to bring about their removal from farm, forest, or ranch land, but does not include the construction of farm, forest, or ranch roads.(3)(i) Minor drainage means:(A) The discharge of dredged or fill material incidental to connecting upland drainage facilities to waters of the United States, adequate to effect the removal of excess soil moisture from upland croplands. Construction and maintenance of upland (dryland) facilities, such as ditching and tiling, incidental to the planting, cultivating, protecting, or harvesting of crops, involve no discharge of dredged or fill material into waters of the United States, and as such never require a section 404 permit;(B) The discharge of dredged or fill material for the purpose of installing ditching or other water control facilities incidental to planting, cultivating, protecting, or harvesting

of rice, cranberries or other wetland crop species, where these activities and the discharge occur in waters of the United States which are in established use for such agricultural and silvicultural wetland crop production;(C) The discharge of dredged or fill material for the purpose of manipulating the water levels of, or regulating the flow or distribution of water within, existing impoundments which have been constructed in accordance with applicable requirements of the Act, and which are in established use for the production or rice, cranberries, or other wetland crop species. Note: The provisions of paragraphs (d)(3)(i) (B) and (C) of this section apply to areas that are in established use exclusively for wetland crop production as well as areas in established use for conventional wetland/non-wetland crop rotation (e.g., the rotations of rice and soybeans) where such rotation results in the cyclical or intermittent temporary dewatering of such areas. (D) The discharge of dredged or fill material incidental to the emergency removal of sandbars, gravel bars, or other similar blockages which are formed during flood flows or other events, where such blockages close or constrict previously existing drainageways and, if not promptly removed, would result in damage to or loss of existing crops or would impair or prevent the plowing, seeding, harvesting or cultivating of crops on land in established use for crop production. Such removal does not include enlarging or extending the dimensions of, or changing the bottom elevations of, the affected drainageway			

as it existed prior to the formation of the blockage. Removal must be accomplished within one year after such blockages are discovered in order to be eligible for exemption. (ii) Minor drainage in waters of the United States is limited to drainage within areas that are part of an established farming or silviculture operation. It does not include drainage associated with the immediate or gradual conversion of a wetland to a non-wetland (e.g., wetland species to upland species not typically adequate to life in saturated soil conditions), or conversion from one wetland use to another (for example, silviculture to farming).In addition, minor drainage does not include the construction of any canal, ditch, dike or other waterway or structure which drains or otherwise significantly modifies a stream, lake, swamp, bog or any other wetland or aquatic area constituting waters of the United States. Any discharge of dredged or fill material into the waters of the United States incidental to the construction of any such structure or waterway requires a permit.(4) Plowing means all forms of primary tillage, including moldboard, chisel, or wide-blade plowing, discing, harrowing, and similar physical means used on farm, forest or ranch land for the breaking up, cutting, turning over, or stirring of soil to prepare it for the planting of crops. Plowing does not include the redistribution of soil, rock, sand, or other surficial materials in a manner which changes any area of the waters of the United States to dryland. For example, the redistribution of surface materials by blading, grading, or other

means to fill in wetland areas is not plowing. Rock crushing activities which result in the loss of natural drainage characteristics, the reduction of water storage and recharge capabilities, or the overburden of natural water filtration capacities do not constitute plowing. Plowing, as described above, will never involve a discharge of dredged or fill material.(5) Seeding means the sowing of seed and placement of seedlings to produce farm, ranch, or forest crops and includes the placement of soil beds for seeds or seedlings on established farm and forest lands.(e) Federal projects which qualify under the criteria contained in section 404(r) of the Act are exempt from section 404 permit requirements, but may be subject to other State or Federal requirements.			

Part 230-SECTION 404(B)(1) GUIDELINES FOR S PECIFCATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL

Subpart A-General
§ 230.5 General procedures to be followed.

In evaluating whether a particular discharge site may be specified, the permitting authority should use these Guidelines in the following sequence: (a) In order to obtain an overview of the principal regulatory provisions of the Guidelines, review the restrictions on discharge in § 230.10(a) through (d), the measures to minimize adverse impact of subpart H, and the required factual determinations of § 230.11. (b) Determine if a General permit (§ 230.7) is applicable; if so, the applicant needs merely to	ORS 196.825(1)-(6)	Two determinations are made based on the information gathered by considering nine criteria.	Oregon does not specifically sequence its decision making; however, it does gather and analyze information then make two ultimate determinations.

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comply with its terms, and no further action by the permitting authority is necessary. Special conditions for evaluation of proposed General permits are contained in § 230.7. If the discharge is not covered by a General permit: (c) Examine practicable alternatives to the proposed discharge, that is, not discharging into the waters of the U.S. or discharging into an alternative aquatic site with potentially less damaging consequences (§ 230.10(a)). (d) Delineate the candidate disposal site consistent with the criteria and evaluations of § 230.11(f). (e) Evaluate the various physical and chemical components which characterize the non-living environment of the candidate site, the substrate and the water including its dynamic characteristics (subpart C). (f) Identify and evaluate any special or critical characteristics of the candidate disposal site, and surrounding areas which might be affected by use of such site, related to their living communities or human uses (subparts D, E, and F). (g) Review Factual Determinations in § 230.11 to determine whether the information in the project file is sufficient to provide the documentation required by § 230.11 or to perform the pre-testing evaluation described in § 230.60, or other information is necessary. (h) Evaluate the material to be discharged to determine the possibility of chemical contamination or physical incompatibility of the material to be discharged (§ 230.60). (i) If there is a reasonable probability of chemical contamination, conduct the			

appropriate tests according to the section on Evaluation and Testing (§ 230.61). (j) Identify appropriate and practicable changes to the project plan to minimize the environmental impact of the discharge, based upon the specialized methods of minimization of impacts in subpart H. (k) Make and document Factual Determinations in § 230.11. (l) Make and document Findings of Compliance (§ 230.12) by comparing Factual Determinations with the requirements for discharge of § 230.10. This outline of the steps to follow in using the Guidelines is simplified for purposes of illustration. The actual process followed may be iterative, with the results of one step leading to a reexamination of previous steps. The permitting authority must address all of the relevant provisions of the Guidelines in reaching a Finding of Compliance in an individual case.			

Part 233-404 STATE PROGRAM REGULATIONS

Add bill language, passed to allow state to partially assume

Subpart C – Permit Requirements

§ 233.20 Prohibitions: No permit shall be issued by the Director in the following circumstances:

(a) When permit does not comply with the requirements of the Act or regulations thereunder, including the section 404(b)(1) Guidelines (part 230 of this chapter). (b) When the Regional Administrator has objected to issuance of the permit under § 233.50 and the objection has not been resolved.			

Commented [PB12]: The DOJ doc did not have this section. What is the Oregon equivalent?

(c) When the proposed discharges would be in an area which has been prohibited, withdrawn, or denied as a disposal site by the Administrator under section 404(c) of the Act, or when the discharge would fail to comply with a restriction imposed thereunder.
(d) If the Secretary determines, after consultation with the Secretary of the Department in which the Coast Guard is operating, that anchorage and navigation of any of the navigable waters would be substantially impaired.

§ 233.21 General permits.

(a) Under section 404(h)(5) of the Act, States may, after program approval, administer and enforce general permits previously issued by the Secretary in State regulated waters.
Note:
If States intend to assume existing general permits, they must be able to ensure compliance with existing permit conditions an any reporting monitoring, or prenotification requirements.
(b) The Director may issue a general permit for categories of similar activities if he determines that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment. Any general permit issued shall be in compliance with the section 404(b)(1) Guidelines.
(c) In addition to the conditions specified in § 233.23, each general permit shall contain:

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(1) A specific description of the type(s) of activities which are authorized, including limitations for any single operation. The description shall be detailed enough to ensure that the requirements of paragraph (b) of this -section are met. (This paragraph super-cedes § 233.23(c)(1) for general permits.)
(2) A precise description of the geographic area to which the general permit applies, including limitations on the type(s) of water where operations may be conducted sufficient to ensure that the requirements of paragraph (b) of this section are met.
(d) Predischarge notification or other reporting requirements may be required by the Director on a permit-by-permit basis as appropriate to ensure that the general permit will comply with the requirement (section 404(e) of the Act) that the regulated activities will cause only minimal adverse environmental effects when performed separately and will have only minimal cumulative adverse effects on the environment.
(e) The Director may, without revoking the general permit, require any person authorized under a general permit to apply for an individual permit. This discretionary authority will be based on concerns for the aquatic environment including compliance with paragraph (b) of this section and the 404(b)(1) Guidelines (40 CFR part 230.)
(1) This provision in no way affects the legality of activities undertaken pursuant to the general permit prior to notification by the Director of such requirement.
(2) Once the Director notifies the discharger of his decision to exercise discretionary authority

to require an individual permit, the discharger's activity is no longer authorized by the general permit.			

§ 233.22 Emergency permits.

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(a) Notwithstanding any other provision of this part, the Director may issue a temporary emergency permit for a discharge of dredged or fill material if unacceptable harm to life or severe loss of physical property is likely to occur before a permit could be issued or modified under procedures normally required. (b) Emergency permits shall incorporate, to the extent possible and not inconsistent with the emergency situation, all applicable requirements of § 233.23. (1) Any emergency permit shall be limited to the duration of time (typically no more than 90 days) required to complete the authorized emergency action. (2) The emergency permit shall have a condition requiring appropriate restoration of the site. (c) The emergency permit may be terminated at any time without process (§ 233.36) if the Director determines that termination is necessary to protect human health or the environment. (d) The Director shall consult in an expeditious manner, such as by telephone, with the Regional Administrator, the Corps, FWS, and NMFS about issuance of an emergency permit. (e) The emergency permit may be oral or written. If oral, it must be followed within 5 days by a written emergency permit. A copy of			

the written permit shall be sent to the Regional Administrator. (f) Notice of the emergency permit shall be published and public comments solicited in accordance with § 233.32 as soon as possible but no later than 10 days after the issuance date.			

§ 233.23 Permit conditions.

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(a) For each permit the Director shall establish conditions which assure compliance with all applicable statutory and regulatory requirements, including the 404(b)(1) Guidelines, applicable section 303 water quality standards, and applicable section 307 effluent standards and prohibitions. (b) Section 404 permits shall be effective for a fixed term not to exceed 5 years. (c) Each 404 permit shall include conditions meeting or implementing the following requirements: (1) A specific identification and complete description of the authorized activity including name and address of permittee, location and purpose of discharge, type and quantity of material to be discharged. (This subsection is not applicable to general permits). (2) Only the activities specifically described in the permit are authorized. (3) The permittee shall comply with all conditions of the permit even if that requires halting or reducing the permitted activity to maintain compliance. Any permit violation constitutes a violation of the Act as well as of State statute and/or regulation.			

(4) The permittee shall take all reasonable steps to minimize or prevent any discharge in violation of this permit. (5) The permittee shall inform the Director of any expected or known actual noncompliance. (6) The permittee shall provide such information to the Director, as the Director requests, to determine compliance status, or whether cause exists -for permit modification, revocation or -termination. (7) Monitoring, reporting and recordkeeping requirements as needed to safeguard the aquatic environment. (Such requirements will be determined on a case-by-case basis, but at a minimum shall include monitoring and reporting of any expected leachates, reporting of noncompliance, planned changes or transfer of the permit.) (8) Inspection and entry. The permittee shall allow the Director, or his authorized representative, upon presentation of proper identification, at reasonable times to: (i) Enter upon the permittee's premises where a regulated activity is located or where records must be kept under the conditions of the permit, (ii) Have access to and copy any records that must be kept under the conditions of the permit, (iii) Inspect operations regulated or required under the permit, and (iv) Sample or monitor, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.			

(9) Conditions assuring that the discharge will be conducted in a manner which minimizes adverse impacts upon the physical, chemical and biological integrity of the waters of the United States, such as requirements for restoration or mitigation.			

Subpart D–Program Operation
§ 233.30 Application for a permit.

(a) Except when an activity is authorized by a general permit issued pursuant to section 233.21 or is exempt from the requirements to obtain a permit under section 232.3, any person who proposes to discharge dredged or fill material into State regulated waters shall complete, sign and submit a permit application to the Director. Persons proposing to discharge dredged or fill material under the authorization of a general permit must comply with any reporting requirements of the general permit.	ORS 196.825(12)(b)	"Completed application" means a signed permit application form that contains all necessary information for the director to determine whether to issue a permit, including: a map showing the project site with sufficient accuracy to easily locate the removal or fill site; a project plan showing the project site and proposed alterations; the fee; any changes that may be made to the hydraulic characteristics of waters of this state and a plan to minimize or avoid any adverse effects of those changes; if the project may cause substantial adverse effects on aquatic life or aquatic habitat within this state, documentation of existing conditions and resources and identification of the potential impact if the project is completed; an analysis of alternatives that evaluates practicable methods to minimize and avoid impacts to waters of this state; if the project	DSL uses the same application form that the Corps uses in Oregon.

		is to fill or remove material from wetlands, a wetlands mitigation plan; and any other information the director deems pertinent and necessary to make an informed decision on whether the application complies with the policy and standards set forth in ORS 196.825.	
(b) A complete application shall include: (1) Name, address, telephone number of the applicant and name(s) and address(es) of adjoining property owners. (2) A complete description of the proposed activity including necessary drawings, sketches or plans sufficient for public notice (the applicant is not generally expected to submit detailed engineering plans and specifications); the location, purpose and intended use of the proposed activity; scheduling of the activity; the location and dimensions of adjacent structures; and a list of authorizations required by other Federal, interstate, State or local agencies for the work, including all approvals received or denials already made. (3) The application must include a description of the type, composition, source and quantity of the material to be discharged, the method of discharge, and the site and plans for disposal of the dredged or fill material. (4) A certification that all information contained in the application is true and accurate and acknowledging awareness of penalties for submitting false information. (5) All activities which the applicant plans to undertake which are reasonably related to the same project	OAR 141-085-0550(1) through (7) OAR 141-085-0555 OAR 141-085-0510(46) and (80)	Rule provides application requirements for individual permits; supplements statutory list of requirements for a "completed application" including that the level of detail may vary. List is too long for this crosswalk. Rule provides procedures regarding completeness determinations. "Independent utility" means that the project accomplishes its intended purpose without the need for additional phases or other projects requiring further removal or fill activities. "Project" means the primary development or use, having independent utility, proposed by one person; a project may include more than one removal or fill activity.	Application form includes a certification.

should be included in the same permit application.			
(c) In addition to the information indicated in section 233.30(b), the applicant will be required to furnish such additional information as the Director deems appropriate to assist in the evaluation of the application. Such additional information may include environmental data and information on alternate methods and sites as may be necessary for the preparation of the required environmental documentation.			
(d) The level of detail shall be reasonably commensurate with the type and size of discharge, proximity to critical areas, likelihood of long-lived toxic chemical substances, and potential level of environmental degradation.			

§ 233.31 Coordination requirements.

(a) If a proposed discharge may affect the biological, chemical, or physical integrity of the waters of any State(s) other than the State in which the discharge occurs, the Director shall provide an opportunity for such State(s) to submit written comments within the public comment period and to suggest permit conditions. If these recommendations are not accepted by the Director, he shall notify the affected State and the Regional Administrator prior to permit issuance in writing of his failure to accept these recommendations, together with his reasons for so doing. The Regional Administrator shall then have the time provided for in § 233.50(d) to comment upon, object to, or make recommendations.	OAR 141-085-0560(1)	Notification that completed application is available for review is delivered to list of entities including state agencies "in the geographic area affected by the permit".	Oregon could amend ORS 196.825 to allow DSL to seek EPA approval to reject a recommendation from a state affected by the permit.

(b) State section 404 permits shall be coordinated with Federal and Federal-State water related planning and review processes.			

§ 233.32 Public notice.

(a) Applicability. (1) The Director shall give public notice of the following actions: (i) Receipt of a permit application. (ii) Preparation of a draft general permit. (iii) Consideration of a major modification to an issued permit. (iv) Scheduling of a public hearing. (v) Issuance of an emergency permit. (2) Public notices may describe more than one permit or action.	ORS 196.825(6)(a)	The director may request comment from interested parties and adjacent property owners on any application for a permit.	DSL may promulgate rule regarding public comment period for emergency authorizations.
(b) Timing. (1) The public notice shall provide a reasonable period of time, normally at least 30 days, within which interested parties may express their views concerning the permit application. (2) Public notice of a public hearing shall be given at least 30 days before the hearing. (3) The Regional Administrator may approve a program with shorter public notice timing if the Regional Administrator determines that sufficient public notice is provided for.	ORS 196.825(6)(c)	For linear facilities, notice is to be sent to landowner of site specified in application and all adjacent landowners.	
(c) The Director shall give public notice by each of the following methods: (1) By mailing a copy of the notice to the following persons (any person otherwise entitled to receive notice under this paragraph may waive his rights to receive notice for any classes or categories of permits): (i) The applicant. (ii) Any agency with jurisdiction over the activity or the disposal site, whether or not the agency issues a permit. (iii) Owners of property adjoining the property where the regulated	OAR 141-085-0580(7)(a)	At its discretion, DSL may circulate proposed project modifications for public review; situations where it may be necessary include those that would result in an increase in adverse impacts or those that involve significant changes in operating conditions.	

activity will occur. (iv) All persons who have specifically requested copies of public notices. (The Director may update the mailing list from time to time by requesting written indication of continued interest from those listed. The Director may delete from the list the name of any person who fails to respond to such a request.) (v) Any State whose waters may be affected by the proposed discharge. (2) In addition, by providing notice in at least one other way (such as advertisement in a newspaper of sufficient circulation) reasonably calculated to cover the area affected by the activity.	OAR 141-085-0560(1)	Notice of public comment period is sent to adjacent property owners, watershed councils, public interest groups, affected local government land use planning departments, state agencies, and federal agencies and tribal governments in the geographic area affected by the permit. Notice is sent by US mail or electronically (e.g., fax, email, posting on the Internet).	
(d) All public notices shall contain at least the following information: (1) The name and address of the applicant and, if different, the address or location of the activity(ies) regulated by the permit. (2) The name, address, and telephone number of a person to contact for further information. (3) A brief description of the comment procedures and procedures to request a public hearing, including deadlines. (4) A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type of structures, if any, to be erected on fills, and a description of the type, composition and quantity of materials to be discharged. (5) A plan and elevation drawing showing the general and specific site location and character of all proposed activities, including the size relationship of the proposed structures	OAR 141-085-0560(3) OAR 141-085-0550(9) ORS 196.817(1)(a)(A) and ORS 183.335(3)(a)	Public comment period is 30 calendar days from the date of the notice, except DEQ shall have 75 calendar days if the application requires a 401 certification. If applicant modifies application, DSL may circulate the revised application again for public review; modifications proposing significantly different or additional adverse impacts will generally be resubmitted for public review. DSL may establish general permits by rule for processing applications on a statewide or geographic basis; or by order for an applicant or group of applicants to cover activities that are substantially similar in nature,	See section regarding General Permits for additional information, including information about the I Concept for 2013.

to the size of the impacted waterway and depth of water in the area. (6) A paragraph describing the various evaluation factors, including the 404(b)(1) Guidelines or State-equivalent criteria, on which decisions are based. (7) Any other information which would significantly assist interested parties in evaluating the likely impact of the proposed activity.		are recurring or ongoing, and have predictable effects and outcomes. Rulemaking process includes "reasonable opportunity" for public comment.	
(e) Notice of public hearing shall also contain the following information: (1) Time, date, and place of hearing. (2) Reference to the date of any previous public notices relating the permit. (3) Brief description of the nature and purpose of the hearing.	OAR 141-093-0103	General permits are promulgated as administrative rules.	

§ 233.33 Public hearing.

(a) Any interested person may request a public hearing during the public comment period as specified in § 233.32. Requests shall be in writing and shall state the nature of the issues proposed to be raised at the hearing. (b) The Director shall hold a public hearing whenever he determines there is a significant degree of public interest in a permit application or a draft general permit. He may also hold a hearing, at his discretion, whenever he determines a hearing may be useful to a decision on the permit application. (c) At a hearing, any person may submit oral or written statements or data concerning the permit application or draft general permit. The public comment period shall automatically be extended to the close of any public hearing under this section. The presiding officer may	OAR 141-085-0560(4)(b)	At DSL's discretion, DSL may hold a public hearing to gather necessary information that may not otherwise be available to make a decision.	

also extend the comment period at the hearing. (d) All public hearings shall be reported verbatim. Copies of the record of proceedings may be purchased by any person from the Director or the reporter of such hearing. A copy of the transcript (or if none is prepared, a tape of the proceedings) shall be made available for public inspection at an appropriate State office.			

§ 233.34 Making a decision on the permit application.

(a) The Director will review all ap-plications for compliance with the 404(b)(1) Guidelines and/or equivalent State environmental criteria as well as any other applicable State laws or regulations. (b) The Director shall consider all comments received in response to the public notice, and public hearing if a hearing is held. All comments, as well as the record of any public hearing, shall be made part of the official record on the application. (c) After the Director has completed his review of the application and consideration of comments, the Director will determine, in accordance with the record and all applicable regulations, whether or not the permit should be issued. No permit shall be issued by the Director under the circumstances described in § 233.20. The Director shall prepare a written determination on each application outlining his decision and rationale for his decision. The determination shall be dated, signed and included in the official record prior to final	ORS 196.825(1) ORS 196.825(3)	DSL shall issue a permit if applied for, if the director determines that the project described in the application: is consistent with the protection, conservation and best use of the water resources of this state as specified in ORS 196.600 to 196.905; and would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation. In determining whether to issue a permit in an area that is not subject to an approved wetland conservation plan, the director will consider nine criteria. Consider the public need for the proposed fill or removal and the social, economic or other public benefits likely to result from the	

action on the application. The official record shall be open to the -public.		proposed fill or removal; may rely on findings of a public body. Consider the economic cost to the public if the proposed fill or removal is not accomplished. Consider the availability of alternatives to the project for which the fill or removal is proposed. Consider the availability of alternative sites for the proposed fill or removal. Consider whether the proposed fill or removal conforms to sound policies of conservation and would not interfere with public health and safety. Consider whether the proposed fill or removal is in conformance with existing public uses of the waters and with uses designated for adjacent land in an acknowledged comprehensive plan and land use regulations. Consider whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion. Consider whether the proposed fill or removal is for streambank protection.	

	ORS 196.682(1)	Consider whether the applicant has provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800; consider 196.668 and 196.672. In determining whether to issue a permit in an area that is subject to an approved wetland conservation plan, the director will determine whether the permit would be consistent with the wetland conservation plan or could be conditioned to be consistent with the plan.	Note: Wetland Conservation Plans are submitted, reviewed, and potentially approved pursuant to ORS 196.678 through 196.684.
	ORS 192.410 to 192.505	Oregon Public Records Act allows any person to inspect any public records in the custody of DSL, with specified exemptions.	
	OAR 141-085-0565(7)	DSL will issue written findings in the following circumstances: permit denial; fill of two acres or more in wetlands; fill in estuaries (with specified exceptions); removal from estuaries of more than 10,000 cy (except for maintenance dredging); placement of greater than 2,500 cy of riprap in costal steams or estuaries; removal/fill in the Oregon Territorial Sea; and any permit decision that is contrary to the final decision	DSL may also issue findings in other circumstances.

Commented [PB16]: There is no ORS 192.410. Use 192.411?

Commented [PB17]: To 192.499?

	OAR 141-085-0560(4)	recommendation of a state agency. DSL will review and consider substantive comments received during the public review period, and may conduct any necessary investigations to develop a factual basis for a permit decision; as a result of the public review process or DSL's investigations, DSL may request that the applicant submit supplemental information and answer additional questions.	

§ 233.35 Issuance and effective date of permit.

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(a) If the Regional Administrator comments on a permit application or draft general permit under section 233.50, the Director shall follow the procedures specified in that section in issuing the permit.			
(b) If the Regional Administrator does not comment on a permit application or draft general permit, the Director shall make a final permit decision after the close of the public comment period and shall notify the applicant. (1) If the decision is to issue a permit, the permit becomes effective when it is signed by the Director and the applicant. (2) If the decision is to deny the permit, the Director will notify the applicant in writing of the reason(s) for denial.			

§ 233.36 Modification, suspension or revocation of permits.

(a) General. The Director may reevaluate the circumstances and conditions of a permit either on his own motion or at the request of the permittee or of a third party and initiate action to modify, suspend, or revoke a permit if he determines that sufficient cause exists. Among the factors to be considered are: (1) Permittee's noncompliance with any of the terms or conditions of the permit; (2) Permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts or the permittee's misrepresentation of any relevant facts at the time; (3) Information that activities authorized by a general permit are having more than minimal individual or cumulative adverse effect on the environment, or that the permitted activities are more appropriately regulated by individual permits; (4) Circumstances relating the authorized activity have changed since the permit was issued and justify changed permit conditions or temporary or permanent cessation of any discharge controlled by the permit; (5) Any significant information relating the activity authorized by the permit if such information was not available at the time the permit was issued and would have justified the imposition of different permit conditions or denial at the time of issuance; (6) Revisions to applicable statutory or regulatory authority, including toxic effluent standards or prohibitions or water quality standards.	ORS 196.865	If the Director finds that individual is acting contrary to conditions set out in permit, director may revoke, suspend, or refuse to renew such permit. For revocations (and suspensions), DSL must give notice and opportunity for a contested case hearing.	
(b) Limitations. Permit modifications shall be in compliance with section 233.20.	OAR 141-085-0550(2)	Failure to provide complete and accurate information in the application may be grounds for	

		administrative closure of the application, denial, suspension or revocation of the authorization.	
(c) Procedures. (1) The Director shall develop procedures to modify, suspend or revoke permits if he determines cause exists for such action (section 233.36(a)). Such procedures shall provide opportunity for public comment (section 233.32), coordination with the Federal review agencies (section 233.50), and opportunity for public hearing (section 233.33) following notification of the permittee. When permit modification is proposed, only the conditions subject to modification need be reopened. (2) Minor modification of permits. The Director may, upon the consent of the permittee, use abbreviated procedures to modify a permit to make the following corrections or allowance for changes in the permitted activity: (i) Correct typographical errors; (ii) Require more frequent monitoring or reporting by permittee; (iii) Allow for a change in ownership or operational control of a project or activity where the Director determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the Director; (iv) Provide for minor modification of project plans that do not significantly change the character, scope, and/or purpose of the project or result in significant change in environmental impact; (v) Extend the term of a permit, so long as the	OAR 141-085-0780(1) OAR 141-085-0780(3) OAR 141-085-0780(4) OAR 141-085-0770(1)(c) OAR 141-093-0104(4)	DSL may suspend or revoke an authorization if an alleged violator is not in compliance with any conditions of an authorization, or if the applicant failed to provide complete and accurate information in the permit application. Procedures to revoke or suspend an authorization include notice and opportunity for contested case hearing. If a person fails to comply with reporting requirements or any other condition of a multi-year authorization, DSL may revoke the multi-year status and require annual renewal, suspend the permit pending correction, or take other enforcement action. Obtaining an authorization or reporting on conditions of an authorization by misrepresentation or by failure to fully disclose known material facts is a violation. DSL may require an individual permit, rather than issue an authorization to use a general permit, if the activity may have	

modification does not extend the term of the permit beyond 5 years from its original effective date and does not result in any increase in the amount of dredged or fill material allowed to be discharged.	OAR 141-085-0585(7) ORS 196.825(5)	unpredictable effects or outcomes which may result in unacceptable individual or cumulative environmental effects to waters of this state; or if the activity might result in long-term harm to water resources of this state; or if the ODFW, DEQ, or the local land use planning department requests that the DSL do so. DSL may modify a permit: at any time upon request of permit holder to address changes in operating conditions or changes to the project; or on its own initiative at the time of permit renewal to address new standards in effect at the time of the renewal request or new information related to water resource impacts. DSL may impose such conditions as the director considers necessary to carry out the purposes of ORS 196.805 and 196.830 and 196.825(1), and to provide mitigation for the reasonably expected adverse effects of project development.	
	OAR 141-085-0580(8)	Authorizations are issued to the applicant, but DSL may transfer permit responsibility. If the authorization has not expired, the transfer is made through a modification. If the authorization has expired, but there is a pending	

		mitigation obligation, the transfer is made through an acknowledgment letter.	

§ 233.37 Signatures on permit applications and reports.

The application and any required reports must be signed by the person who desires to undertake the proposed activity or by that person's duly authorized agent if accompanied by a statement by that person designating the agent. In either case, the signature of the applicant or the agent will be understood to be an affirmation that he possesses or represents the person who possesses the requisite property interest to undertake the activity proposed in the application.			

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§ 233.38 Continuation of expiring permits.

A Corps 404 permit does not continue in force beyond its expiration date under Federal law if, at that time, a State is the permitting authority. States authorized to administer the 404 Program may continue Corps or State-issued permits until the effective date of the new permits, if State law allows. Otherwise, the discharge is being conducted without a permit from the time of expiration of the old permit to the effective date of a new State-issued permit, if any.			

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Subpart E–Compliance Evaluation and Enforcement

§ 233.40 Requirements for compliance evaluation programs.

(a) In order to abate violations of the permit program, the State shall maintain a program designed to identify persons subject to	ORS 196.860(1)	If Director determines that material is being removed from or filling is occurring in any of the waters of the state without a	LConcept 2013 could seek clarification that: enforcement tools are available to determine compliance or noncompliance;

regulation who have failed to obtain a permit or to comply with permit conditions.		permit, or in a manner contrary to the conditions in a permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan, the Director may: investigate, hold hearings, make orders, and take action as provided in ORS 196.600 to 196.905 as soon as possible; through employees or duly authorized representatives of DSL, enter at reasonable times upon any private or public property; conduct public hearings in accordance with ORS chapter 183; publish findings and recommendations as they are developed relative to public policies and procedures necessary for the correction of conditions or violations; give notice of proposed order relating to a violation; and take appropriate action for the enforcement of any rules or final orders (e.g., enjoin in civil abatement action, seek compensation).	clarify authority to inspect and copy records and to collect and test samples; and for processing publicly submitted information.
(b) The Director and State officers engaged in compliance evaluation, upon presentation of proper identification, shall have authority to enter any site or premises subject to regulation or in which records relevant to program operation are kept in order to copy any records, inspect, monitor or otherwise investigate compliance with the State program.	OAR 141-085-0770(2)	Alleged or suspected violations may be reported as complaints to DSL in person, by email, fax, telephone, or in writing. If the complainant specifically requests confidentiality, the information may be held confidential if the requirements of ORS 192.501 or	

Commented [PB21]: Verify source. I think DOJ source is incorrect.

		192.502 (public records law exemptions) are met.	
(c) The State program shall provide for inspections to be conducted, samples to be taken and other information to be gathered in a manner that will produce evidence admissible in an enforcement proceeding.			
(d) The State shall maintain a program for receiving and ensuring proper consideration of information submitted by the public about violations.			

§ 233.41 Requirements for enforcement authority.

(a) Any State agency administering a program shall have authority: (1) To restrain immediately and effectively any person from engaging in any unauthorized activity; (2) To sue to enjoin any threatened or continuing violation of any program requirement; (3) To assess or sue to recover civil penalties and to seek criminal remedies, as follows: (i) The agency shall have the authority to assess or recover civil penalties for discharges of dredged or fill material without a required permit or in violation of any section 404 permit condition in an amount of at least $5,000 per day of such violation. (ii) The agency shall have the authority to seek criminal fines against any person who willfully or with criminal negligence discharges dredged or fill material without a required permit or violates any permit condition issued under section 404 in the amount of at least $10,000 per day of such violation. (iii) The agency shall have the authority to seek criminal fines against any	ORS 196.860(2) and (3) ORS 196.860(1) and (3)	Director may enter an order requiring any person to cease and desist from any violation (removing or filling without a permit or in a manner contrary to permit conditions) if the director determines that the violation presents an imminent and substantial risk of injury, loss or damage to water resources. May be entered without prior notice or hearing. Order subject to contested case hearing, if requested; order is not stayed pending the hearing. This order provides for enforcement assistance from state and local police and circuit courts. Enforcement powers include authority to enjoin violations of ORS 196.600 to 196.905 or of any rule or final order (related to	

person who knowingly makes false statements, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under the Act, these regulations or the approved State program, or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under the permit, in an amount of at least $5,000 for each instance of violation.	OAR 141-085-0775	removing or filling without a permit or in a manner contrary to permit conditions) through civil abatement proceedings. Enforcement actions summarized, including that DSL may issue restoration orders when an cooperative agreement cannot be reached to resolve the violation, and may use consent agreements and consent orders when an agreement can be reached to resolve the violation.	
(b) (1) The approved maximum civil penalty or criminal fine shall be assessable for each violation and, if the violation is continuous, shall be assessable in that maximum amount for each day of violation. (2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or intent EPA must bear when it brings an action under the Act.	ORS 196.865	If the Director finds that individual is acting contrary to conditions set out in permit, director may revoke, suspend, or refuse to renew such permit. For revocations, DSL must give notice and opportunity for a contested case hearing.	
(c) The civil penalty assessed, sought, or agreed upon by the Director under paragraph (a)(3) of this section shall be appropriate to the violation. Note: To the extent that State judgments or settlements provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA may, when authorized by section 309 of the Act, commence separate action for penalties.	OAR 141-085-0780	DSL may suspend or revoke an authorization if an alleged violator is not in compliance with any conditions of an authorization, or if the applicant failed to provide complete and accurate information in the permit application.	

(d) (1) The Regional Administrator may approve a State program where the State lacks authority to recover penalties of the levels required under paragraphs (a)(3)(i)-(iii) of this section only if the Regional Administrator determines, after evaluating a record of at least one year for an alternative enforcement program, that the State has an alternate, demonstrably effective method of ensuring compliance which has both punitive and deterrence effects. (2) States whose programs were approved via waiver of monetary penalties shall keep the Regional Administrator informed of all enforcement actions taken under any alternative method approved pursuant to paragraph (d)(1) of this section. The manner of reporting will be established in the Memorandum of Agreement with the Regional Administrator (section 233.13).	ORS 196.990 and 196.810 ORS 196.855	Person commits offense of unlawful removal from or filling of waters of this state if the person knowingly violates ORS 196.810 (permit requirement; removal/fill in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan); the offense is punishable by a fine of up to $10,000 per day of violation. Removal of material or filling the waters of this state without a permit issued under ORS 196.825, or in a manner contrary to the permit conditions, or in a manner contrary to the conditions set out in an order approving a wetland conservation plan is a public nuisance.	
(e) Any State administering a program shall provide for public participation in the State enforcement process by providing either: (1) Authority which allows intervention of right in any civil or administrative action to obtain remedies specified in paragraph (a)(3) of this section by any citizen having an interest which is or may be adversely affected, or (2) Assurance that the State agency or enforcement authority will: (i) Investigate and provide written responses to all citizen complaints submitted pursuant to State procedures; (ii) Not oppose intervention by any citizen when permissive intervention may	ORS 196.870	DSL or a person may institute a civil proceeding to abate public nuisances under ORS 196.855. Persons must give 60 days notice to the director, and may not commence proceeding if director is diligently prosecuting civil, criminal or administrative proceedings in the same manner. Director may institute proceeding for a temporary restraining order or preliminary injunction if the existing or threatened public nuisance creates an emergency	

be authorized by statute, rule, or regulation; and (iii) Publish notice of and provide at least 30 days for public comment on any proposed settlement of a State enforcement action.		that requires immediate action to protect the public health, safety or welfare. All actions are expedited by the court. Proceedings may include compensation for any destruction or infringement of any public right of navigation, fishery or recreation; money is deposited in Common School Fund.	
(f) Provision for Tribal criminal enforcement authority. To the extent that an Indian Tribe does not assert or is precluded from asserting criminal enforcement authority (section 233.41(a)(3) (ii) and (iii)), the Federal government will continue to exercise primary criminal enforcement responsibility. The Tribe, with the EPA Region and Corps District(s) with jurisdiction, shall develop a system where the Tribal agency will refer such a violation to the Regional Administrator or the District Engineer(s), as agreed to by the parties, in an appropriate and timely manner. This agreement shall be incorporated into joint or separate Memorandum of Agreement with the EPA Region and the Corps District(s), as appropriate.	ORS 196.875 ORS 196.890 OAR 141-085-0770(1)	Allows for double or treble damages for destruction of public right of navigation, fishery, or recreation. Costs and attorney fees shall be awarded to the prevailing party; if the director is awarded costs and fees, the money shall be deposited into the Common School Fund to offset the expenses of the litigation. Any person who violates ORS 196.600 to 196.905 or any rule, order or permit shall be subject to a civil penalty in an amount determined by the Director of not more than $10,000 per day of violation. A violation is: removal/fill without a valid authorization; noncompliance with any condition of an authorization; obtaining an authorization or reporting on conditions of an authorization by misrepresentation or by failure to fully disclose known material facts; failing to comply with ay	

		terms of an enforcement order; failing to comply with the requirements of the removal/fill law or these rules; or violation of any condition of an approved wetland conservation plan.	
	ORS 196.895 and 183.745	Procedures for imposing civil penalties; includes notice and opportunity for a contested case hearing.	
	ORS 196.900	Schedule of civil penalties and factors to be considered in imposing civil penalties. Rules establish standard amounts, but the amount may be remitted or mitigated upon such terms and conditions as the director determines to be proper and consistent with the policy of ORS 196.805; upon request, director shall consider evidence of the economic and financial condition of the person in determining whether a penalty shall be remitted or mitigated.	
	OAR 141-085-0785	Civil penalties may be assessed for each violation and for each day of each violation. Procedures for imposing civil penalties includes notice and opportunity for contested case hearing. Factors for calculating the standard amount of the penalty. If the violator fails to pay a civil penalty, the amount doubles periodically up to 10 times the	

		original amount, and interest accrues. Violators may show evidence of financial hardship within 20 calendar days of the notice, and DSL will reduce or waive the penalty if DSL determines that the imposition of the full civil penalty would result in extreme financial hardship for the violator and that the public interest in avoiding extreme financial hardship outweighs the public interest in deterring future violations. DSL may settle violations and penalties in the exercise of its discretion taking into account the cooperation of the violator in addressing the violation.	

Part 233: 404 State Program Regulations
Subpart F-Federal Oversight
233.50
233.51
233.52
233.53
END OF PART 233

Commented [PB22]: Why was this section not included in the draft xwalk? I think it should be.

40 C.F.R. § 230-SECTION 404(b)(1) GUIDELINES FOR SPECIFICATION OF DISPOSAL SITES FOR DREDGED OR FILL MATERIAL
Subpart A-General
§ 230.1 Purpose and policy.

(a) The purpose of these Guidelines is to restore and maintain the chemical, physical, and biological integrity of waters of the	Not Applicable.		Not necessary to include in state law.

Commented [PB23]: Should this be deleted since it's NA?

United States through the control of discharges of dredged or fill material. (b) Congress has expressed a number of policies in the Clean Water Act. These Guidelines are intended to be consistent with and to implement those policies. (c) Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern. (d) From a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources.			

§ 230.2 Applicability.

(a) These Guidelines have been developed by the Administrator of the Environmental Protection Agency in conjunction with the Secretary of the Army acting through the Chief of Engineers under section 404(b)(1) of the Clean Water Act (33 U.S.C. 1344). The Guidelines are applicable to the specification of disposal sites for discharges of dredged or fill material into waters of the United States. Sites may be specified through:	Not Applicable		Not necessary to include in state law.

(1) The regulatory program of the U.S. Army Corps of Engineers under sections 404(a) and (e) of the Act (see 33 CFR Parts 320, 323 and 325);
(2) The civil works program of the U.S. Army Corps of Engineers (see 33 CFR 209.145 and section 150 of Pub. L. 94-587, Water Resources Development Act of 1976);
(3) Permit programs of States approved by the Administrator of the Environmental Protection Agency in accordance with section 404(g) and (h) of the Act (see 40 CFR parts 122, 123 and 124);
(4) Statewide dredged or fill material regulatory programs with best management practices approved under section 208(b)(4)(B) and (C) of the Act (see 40 CFR 35.1560);
(5) Federal construction projects which meet criteria specified in section 404(r) of the Act.
(b) These Guidelines will be applied in the review of proposed discharges of dredged or fill material into navigable waters which lie inside the baseline from which the territorial sea is measured, and the discharge of fill material into the territorial sea, pursuant to the procedures referred to in paragraphs (a)(1) and (2) of this section. The discharge of dredged material into the territorial sea is governed by the Marine Protection, Research, and Sanctuaries Act of 1972, Pub. L. 92-532, and regulations and criteria issued pursuant thereto (40 CFR parts 220 through 228).
(c) Guidance on interpreting and implementing these Guidelines may be prepared jointly by EPA and the Corps at the national or regional level from time to time.

No modifications to the basic application, meaning, or intent of these Guidelines will be made without rulemaking by the Administrator under the Administrative Procedure Act (5 U.S.C. 551 et seq.).			

§ 230.3 Definitions.

For purposes of this part, the following terms shall have the meanings indicated: (a) The term Act means the Clean Water Act (also known as the Federal Water Pollution Control Act or FWPCA) Pub. L. 92-500, as amended by Pub. L. 95-217, 33 U.S.C. 1251, et seq. (b) The term adjacent means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes, and the like are "adjacent wetlands." (c) The terms aquatic environment and aquatic ecosystem mean waters of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals. (d) The term carrier of contaminant means dredged or fill material that contains contaminants. (e) The term contaminant means a chemical or biological substance in a form that can be incorporated into, onto or be ingested by and that harms aquatic organisms, consumers of aquatic organisms, or users of the aquatic environment, and includes but is not limited to the substances on the 307(a)(1) list of toxic	See Definitions, above.		See Definitions, above.

Commented [PB24]: Are these definitions all covered in the prior sections?

pollutants promulgated on January 31, 1978 (43 FR 4109).
(f)-(g) [Reserved]
(h) The term discharge point means the point within the disposal site at which the dredged or fill material is released.
(i) The term disposal site means that portion of the "waters of the United States" where specific disposal activities are permitted and consist of a bottom surface area and any overlying volume of water. In the case of wetlands on which surface water is not present, the disposal site consists of the wetland surface area.
(j) [Reserved]
(k) The term extraction site means the place from which the dredged or fill material proposed for discharge is to be removed.
(l) [Reserved]
(m) The term mixing zone means a limited volume of water serving as a zone of initial dilution in the immediate vicinity of a discharge point where receiving water quality may not meet quality standards or other requirements otherwise applicable to the receiving water. The mixing zone should be considered as a place where wastes and water mix and not as a place where effluents are treated.
(n) The term permitting authority means the District Engineer of the U.S. Army Corps of Engineers or such other individual as may be designated by the Secretary of the Army to issue or deny permits under section 404 of the Act; or the State Director of a permit program

approved by EPA under section 404(g) and section 404(h) or his delegated representative.
(o) The term pollutant means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials not covered by the Atomic Energy Act, heat, wrecked or discarded equipment, rock, sand, cellar dirt, and industrial, municipal, and agricultural waste discharged into water. The legislative history of the Act reflects that "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act means only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated under the Atomic Energy Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant", are radium and accelerator produced isotopes. See Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1 (1976).
(p) The term pollution means the man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of an aquatic ecosystem.
(q) The term practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(q-1) Special aquatic sites means those sites identified in subpart E. They are geographic areas, large or small, possessing special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values. These areas are generally recognized as significantly influencing or positively contributing to the general overall environmental health or vitality of the entire ecosystem of a region. (See § 230.10(a)(3))

(r) The term territorial sea means the belt of the sea measured from the baseline as determined in accordance with the Convention on the Territorial Sea and the Contiguous Zone and extending seaward a distance of three miles.

(s) The term waters of the United States means:

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
(iii) Which are used or could be used for industrial purposes by industries in interstate commerce;
(4) All impoundments of waters otherwise defined as waters of the United States under this definition;
(5) Tributaries of waters identified in paragraphs (s)(1) through (4) of this section;
(6) The territorial sea;
(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (s)(1) through (6) of this section; waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States.
Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.
(t) The term wetlands means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal

circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.			

230.4 Organization.
230.5 General procedures to be followed.
230.6 Alternatives.
230.7 General permits.

Commented [PB25]: Again, why was this section not in the draft xwalk? I think it should be.

Subpart B-Compliance with the Guidelines
§ 230.10 Restrictions on discharge.

(a) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic ecosystem, so long as the alternative does not have other significant adverse environmental consequences. 1) For the purpose of this requirement, practicable alternatives include, but are not limited to: (i) Activities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters; (ii) Discharges of dredged or fill material at other locations in waters of the United States or ocean waters; (2) An alternative is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. If it is otherwise a practicable alternative, an area not presently owned by the applicant which could			

reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered. (3) Where the activity associated with a discharge which is proposed for a special aquatic site (as defined in subpart E) does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (*i.e.*, is not "water dependent"), practicable alternatives that do not involve special aquatic sites are presumed to be available, unless clearly demonstrated otherwise. In addition, where a discharge is proposed for a special aquatic site, all practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise. Actions subject to NEPA - N/A to state program; (4) Actions subject to NEPA - N/A to state program; (5) To the extent that practicable alternatives have been identified and evaluated under a Coastal Zone Management program, a section 208 program, or other planning process, such evaluation shall be considered by the permitting authority as part of the consideration of alternatives under the Guidelines. Where such evaluation is less complete than that contemplated under this subsection, it must be supplemented accordingly. (b) No discharge of dredged or fill material shall be permitted if it: (1) Causes or contributes, after			

consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard; (2) Violates any applicable toxic effluent standard or prohibition under section 307 of the Act; (3) Jeopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act of 1973, as amended, or results in likelihood of the destruction or adverse modification of a habitat which is determined by the Secretary of Interior or Commerce, as appropriate, to be a critical habitat under the Endangered Species Act of 1973, as amended. If an exemption has been granted by the Endangered Species Committee, the terms of such exemption shall apply in lieu of this subparagraph; (4) Violates any requirement imposed by the Secretary of Commerce to protect any marine sanctuary designated under title III of the Marine Protection, Research, and Sanctuaries Act of 1972. (c) Except as provided under section 404(b)(2), no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States. Findings of significant degradation related to the proposed discharge shall be based upon appropriate factual determinations, evaluations, and tests required by subparts B and G, after consideration of subparts C through F, with special emphasis on the persistence and permanence of the effects outlined in those subparts. Under these Guidelines, effects			

contributing to significant degradation considered individually or collectively, include: (1) Significantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites. (2) Significantly adverse effects of the discharge of pollutants on life stages of aquatic life and other wildlife dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site through biological, physical, and chemical processes; (3) Significantly adverse effects of the discharge of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or (4) Significantly adverse effects of discharge of pollutants on recreational, aesthetic, and economic values. (d) Except as provided under section 404(b)(2), no permit unless steps taken to avoid and minimize impacts on aquatic ecosystem.			

§ 230.11 Factual determinations.

The permitting authority shall determine in writing the potential short-term or long-term effects of a proposed discharge of dredged or fill material on the physical, chemical, and biological components of the aquatic			

Commented [PB26]: The DOJ doc didn't include this section. What is the Oregon equivalent?

environment in light of subparts C through F. Such factual determinations shall be used in §230.12 in relating findings of compliance or non-compliance with the restrictions on discharge in §230.10. The evaluation and testing procedures described in §230.60 and §230.61 of subpart G shall be used as necessary to make, and shall be described in, such determination. The determinations of effects of each proposed discharge shall include the following:			
(a) *Physical substrate determinations.* Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, on the characteristics of the substrate at the proposed disposal site. Consideration shall be given to the similarity in particle size, shape, and degree of compaction of the material proposed for discharge and the material constituting the substrate at the disposal site, and any potential changes in substrate elevation and bottom contours, including changes outside of the disposal site which may occur as a result of erosion, slumpage, or other movement of the discharged material. The duration and physical extent of substrate changes shall also be considered. The possible loss of environmental values (§230.20) and actions to minimize impact (subpart H) shall also be considered in making these determinations. Potential changes in substrate elevation and bottom contours shall be predicted on the basis of the proposed method, volume, location, and rate of discharge, as well as on			

the individual and combined effects of current patterns, water circulation, wind and wave action, and other physical factors that may affect the movement of the discharged material.			
(b) *Water circulation, fluctuation, and salinity determinations.* Determine the nature and degree of effect that the proposed discharge will have individually and cumulatively on water, current patterns, circulation including downstream flows, and normal water fluctuation. Consideration shall be given to water chemistry, salinity, clarity, color, odor, taste, dissolved gas levels, temperature, nutrients, and eutrophication plus other appropriate characteristics. Consideration shall also be given to the potential diversion or obstruction of flow, alterations of bottom contours, or other significant changes in the hydrologic regime. Additional consideration of the possible loss of environmental values (§§230.23 through 230.25) and actions to minimize impacts (subpart H), shall be used in making these determinations. Potential significant effects on the current patterns, water circulation, normal water fluctuation and salinity shall be evaluated on the basis of the proposed method, volume, location, and rate of discharge.			
(c) Suspended particulate/turbidity determinations. Determine the nature and degree of effect that the proposed discharge will have, individually and cumulatively, in terms of potential changes in the kinds and concentrations of suspended			

particulate/turbidity in the vicinity of the disposal site. Consideration shall be given to the grain size of the material proposed for discharge, the shape and size of the plume of suspended particulates, the duration of the discharge and resulting plume and whether or not the potential changes will cause violations of applicable water quality standards. Consideration should also be given to the possible loss of environmental values (§230.21) and to actions for minimizing impacts (subpart H). Consideration shall include the proposed method, volume, location, and rate of discharge, as well as the individual and combined effects of current patterns, water circulation and fluctuations, wind and wave action, and other physical factors on the movement of suspended particulates.			
(d) Contaminant determinations. Determine the degree to which the material proposed for discharge will introduce, relocate, or increase contaminants. This determination shall consider the material to be discharged, the aquatic environment at the proposed disposal site, and the availability of contaminants.			
(e) Aquatic ecosystem and organism determinations. Determine the nature and degree of effect that the proposed discharge will have, both individually and cumulatively, on the structure and function of the aquatic ecosystem and organisms. Consideration shall be given to the effect at the proposed disposal site of potential changes in substrate characteristics and elevation, water or substrate chemistry,			

nutrients, currents, circulation, fluctuation, and salinity, on the recolonization and existence of indigenous aquatic organisms or communities. Possible loss of environmental values (§230.31), and actions to minimize impacts (subpart H) shall be examined. Tests as described in §230.61 (Evaluation and Testing), may be required to provide information on the effect of the discharge material on communities or populations of organisms expected to be exposed to it.			
(f) Proposed disposal site determinations. (1) Each disposal site shall be specified through the application of these Guidelines. The mixing zone shall be confined to the smallest practicable zone within each specified disposal site that is consistent with the type of dispersion determined to be appropriate by the application of these Guidelines. In a few special cases under unique environmental conditions, where there is adequate justification to show that widespread dispersion by natural means will result in no significantly adverse environmental effects, the discharged material may be intended to be spread naturally in a very thin layer over a large area of the substrate rather than be contained within the disposal site. (2) The permitting authority and the Regional Administrator shall consider the following factors in determining the acceptability of a proposed mixing zone: (i) Depth of water at the disposal site;			

(ii) Current velocity, direction, and variability at the disposal site; (iii) Degree of turbulence; (iv) Stratification attributable to causes such as obstructions, salinity or density profiles at the disposal site; (v) Discharge vessel speed and direction, if appropriate; (vi) Rate of discharge; (vii) Ambient concentration of constituents of interest; (viii) Dredged material characteristics, particularly concentrations of constituents, amount of material, type of material (sand, silt, clay, etc.) and settling velocities; (ix) Number of discharge actions per unit of time; (x) Other factors of the disposal site that affect the rates and patterns of mixing.			
(g) Determination of cumulative effects on the aquatic ecosystem. (1) Cumulative impacts are the changes in an aquatic ecosystem that are attributable to the collective effect of a number of individual discharges of dredged or fill material. Although the impact of a particular discharge may constitute a minor change in itself, the cumulative effect of numerous such piecemeal changes can result in a major impairment of the water resources and interfere with the productivity and water quality of existing aquatic ecosystems. (2) Cumulative effects attributable to the discharge of dredged or fill material in			

waters of the United States should be predicted to the extent reasonable and practical. The permitting authority shall collect information and solicit information from other sources about the cumulative impacts on the aquatic ecosystem. This information shall be documented and considered during the decision-making process concerning the evaluation of individual permit applications, the issuance of a General permit, and monitoring and enforcement of existing permits.			
(h) Determination of secondary effects on the aquatic ecosystem. (1) Secondary effects are effects on an aquatic ecosystem that are associated with a discharge of dredged or fill materials, but do not result from the actual placement of the dredged or fill material. Information about secondary effects on aquatic ecosystems shall be considered prior to the time final section 404 action is taken by permitting authorities. (2) Some examples of secondary effects on an aquatic ecosystem are fluctuating water levels in an impoundment and downstream associated with the operation of a dam, septic tank leaching and surface runoff from residential or commercial developments on fill, and leachate and runoff from a sanitary landfill located in waters of the U.S. Activities to be conducted on fast land created by the discharge of dredged or fill material in waters of the United States may have secondary impacts within those waters which			

should be considered in evaluating the impact of creating those fast lands.			

§ 230.12 Findings of compliance or non-compliance with the restrictions on discharge.

Commented [PB27]: The DOJ doc didn't include this section. What is the Oregon equivalent?

(a) On the basis of these Guidelines (subparts C through G) the proposed disposal sites for the discharge of dredged or fill material must be: (1) Specified as complying with the requirements of these Guidelines; or (2) Specified as complying with the requirements of these Guidelines with the inclusion of appropriate and practicable discharge conditions (see subparts H and J) to minimize pollution or adverse effects to the affected aquatic ecosystems; or (3) Specified as failing to comply with the requirements of these Guidelines where: (i) There is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences; or (ii) The proposed discharge will result in significant degradation of the aquatic ecosystem under §230.10(b) or (c); or (iii) The proposed discharge does not include all appropriate and practicable measures to minimize potential harm to the aquatic ecosystem; or (iv) There does not exist sufficient information to make a reasonable judgment			

as to whether the proposed discharge will comply with these Guidelines. (b) Findings under this section shall be set forth in writing by the permitting authority for each proposed discharge and made available to the permit applicant. These findings shall include the factual determinations required by §230.11, and a brief explanation of any adaptation of these Guidelines to the activity under consideration. In the case of a General permit, such findings shall be prepared at the time of issuance of that permit rather than for each subsequent discharge under the authority of that permit.			

Subpart C-Potential Impacts on Physical and Chemical Characteristics of the Aquatic Ecosystem

§ 230.20 Substrate.

(a) The substrate of the aquatic ecosystem underlies open waters of the United States and constitutes the surface of wetlands. It consists of organic and inorganic solid materials and includes water and other liquids or gases that fill the spaces between solid particles. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in varying degrees of change in the complex physical, chemical, and biological characteristics of the substrate. Discharges which alter substrate elevation or contours can result in changes in water circulation, depth, current pattern, water fluctuation and water temperature. Discharges may adversely affect bottom-dwelling organisms at the site	ORS 196.825(1) ORS 196.825(3)(i)	Permit will be issued if the project described in the application is consistent with protection, conservation and best use of the water resources of this state as specified in ORS 196.600 through 196.905; and the permit would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation. In determining whether to issue a permit in an area that is not subject to an approved wetland conservation plan, the director will consider whether the	

by smothering immobile forms or forcing mobile forms to migrate. Benthic forms present prior to a discharge are unlikely to recolonize on the discharged material if it is very dissimilar from that of the discharge site. Erosion, slumping, or lateral displacement of surrounding bottom of such deposits can adversely affect areas of the substrate outside the perimeters of the disposal site by changing or destroying habitat. The bulk and composition of the discharged material and the location, method, and timing of discharges may all influence the degree of impact on the substrate.		applicant has provided all practicable mitigation to reduce the adverse effects. In determining whether the applicant has provided all practicable mitigation, the director shall consider the findings regarding wetlands set forth in ORS 196.668 and whether the proposed mitigation advances the policy objectives for the protection of wetlands set forth in ORS 196.672.	

§ 230.21 Suspended particulates/turbidity

(a) Suspended particulates in the aquatic ecosystem consist of fine-grained mineral particles, usually smaller than silt, and organic particles. Suspended particulates may enter water bodies as a result of land runoff, flooding, vegetative and planktonic breakdown, resuspension of bottom sediments, and man's activities including dredging and filling. Particulates may remain suspended in the water column for variable periods of time as a result of such factors as agitation of the water mass, particulate specific gravity, particle shape, and physical and chemical properties of particle surfaces. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can result in greatly elevated levels of suspended particulates in the water column for varying lengths of time.	ORS 196.668	Eleven legislative findings regarding wetlands, including: wetlands provide a natural means of flood and storm damage protection; wetlands provide essential habitats for a major portion of the state's fish and wildlife, for waterfowl using the Pacific Flyway, and rearing of salmon and other anadromous and resident fish; wetlands act as accumulation areas for sediment and help maintain clean water; wetlands provide significant opportunities for research, recreation and education and provide scenic diversity and aesthetic value; much of the state's original wetlands have	

These new levels may reduce light penetration and lower the rate of photosynthesis and the primary productivity of an aquatic area if they last long enough. Sight-dependent species may suffer reduced feeding ability leading to limited growth and lowered resistance to disease if high levels of suspended particulates persist. The biological and the chemical content of the suspended material may react with the dissolved oxygen in the water, which can result in oxygen depletion. Toxic metals and organics, pathogens, and viruses absorbed or adsorbed to fine-grained particulates in the material may become biologically available to organisms either in the water column or on the substrate. Significant increases in suspended particulate levels create turbid plumes which are highly visible and aesthetically displeasing. The extent and persistence of these adverse impacts caused by discharges depend upon the relative increase in suspended particulates above the amount occurring naturally, the duration of the higher levels, the current patterns, water level, and fluctuations present when such discharges occur, the volume, rate, and duration of the discharge, particulate deposition, and the seasonal timing of the discharge.		been altered; there is continuing development pressure on wetlands; there is often conflicts between wetland protection and other resource values and uses; uncoordinated regulation of wetlands can cause confusion, frustration and unreasonable delay and uncertainty for the general public; and wetland management is a matter of state concern.	

§ 230.22 Water.

(a) Water is the part of the aquatic ecosystem in which organic and inorganic constituents are dissolved and suspended. It constitutes part of the liquid phase and is contained by	ORS 196.672(1) and (4)	State policy includes: promote the protection, conservation and best use of wetland resources, their functions and values through the	

the substrate. Water forms part of a dynamic aquatic life-supporting system. Water clarity, nutrients and chemical content, physical and biological content, dissolved gas levels, pH, and temperature contribute to its life-sustaining capabilities. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can change the chemistry and the physical characteristics of the receiving water at a disposal site through the introduction of chemical constituents in suspended or dissolved form. Changes in the clarity, color, odor, and taste of water and the addition of contaminants can reduce or eliminate the suitability of water bodies for populations of aquatic organisms, and for human consumption, recreation, and aesthetics. The introduction of nutrients or organic material to the water column as a result of the discharge can lead to a high biochemical oxygen demand (BOD), which in turn can lead to reduced dissolved oxygen, thereby potentially affecting the survival of many aquatic organisms. Increases in nutrients can favor one group of organisms such as algae to the detriment of other more desirable types such as submerged aquatic vegetation, potentially causing adverse health effects, objectionable tastes and odors, and other problems.		integration and close coordination of statewide planning goals, local comprehensive plans and state and federal regulatory programs; maintain a stable resource base of wetlands through the mitigation of losses of wetland resources and the adoption of the procedural mitigation standard currently used by federal agencies.	

§ 230.23 Current patterns and water circulation.

(a) Current patterns and water circulation are the physical movements of water in the aquatic ecosystem. Currents and circulation	OAR 141-085-0510(40)	"Functions and values" defined. "Functions" are the ecological characteristics or processes	

respond to natural forces as modified by basin shape and cover, physical and chemical characteristics of water strata and masses, and energy dissipating factors. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can modify current patterns and water circulation by obstructing flow, changing the direction or velocity of water flow, changing the direction or velocity of water flow and circulation, or otherwise changing the dimensions of a water body. As a result, adverse changes can occur in: Location, structure, and dynamics of aquatic communities; shoreline and substrate erosion and deposition rates; the deposition of suspended particulates; the rate and extent of mixing of dissolved and suspended components of the water body; and water stratification.	ORS 196.682(1)	associated with a water of the state. "Values" are the societal benefits derived from the ecological characteristics and processes. In determining whether to issue a permit in an area that is subject to an approved wetland conservation plan, the director will determine whether the permit would be consistent with the wetland conservation plan or could be conditioned to be consistent with the plan.	

§ 230.24 Normal water fluctuations.

(a) Normal water fluctuations in a natural aquatic system consist of daily, seasonal, and annual tidal and flood fluctuations in water level. Biological and physical components of such a system are either attuned to or characterized by these periodic water fluctuations. (b) Possible loss of environmental characteristics and values: The discharge of dredged or fill material can alter the normal water-level fluctuation pattern of an area, resulting in prolonged periods of inundation, exaggerated extremes of high and low water, or a static, nonfluctuating water level. Such	OAR 141-085-0550(5)(h)	Application must include a written analysis of the potential changes that the project may make to the hydrologic characteristics of the waters of this state, and an explanation of measures taken to avoid or minimize any adverse impacts of those changes (e.g. impeding, restricting or increasing flows, relocating or redirecting flow, and potential flooding or erosion downstream of the project).	

water level modifications may change salinity patterns, alter erosion or sedimentation rates, aggravate water temperature extremes, and upset the nutrient and dissolved oxygen balance of the aquatic ecosystem. In addition, these modifications can alter or destroy communities and populations of aquatic animals and vegetation, induce populations of nuisance organisms, modify habitat, reduce food supplies, restrict movement of aquatic fauna, destroy spawning areas, and change adjacent, upstream, and downstream areas.	OAR 141-085-0550(5)(i) OAR 141-085-0680(2) OAR 141-085-0685 OAR 141-085-0690(1)	Application must include a description of the existing biological and physical characteristics of the water resources, along with the identification of the adverse impacts that will result from the project. For projects where impacts to wetlands or tidal waters cannot be avoided, compensatory wetland or tidal mitigation (CWM) will be required to compensate for the reasonably expected adverse impacts in fulfillment of the following principal objectives: replace functions and values lost at the removal-fill site; provide local replacement for locally important functions and values, where appropriate; enhance, restore, create or preserve wetlands or tidal areas that are self-sustaining and minimize long-term maintenance needs; ensure the siting of CWM in ecologically suitable locations; minimize temporal loss of wetlands and tidal waters and their functions and values. A functions and values assessment is required for wetlands and tidal waters. The compensatory wetland or tidal mitigation (CWM) must have the capability to replace	

	OAR 141-085-0705	wetland or tidal water types impacted by the project and the functions and values of the impacted wetland or tidal waters. A compensatory wetland or tidal mitigation (CWM) plan must be submitted to the department; the department reviews the plan for sufficiency; the approved plan becomes an enforceable part of the permit	Individual Permit Form includes a condition that all work done under the permit must comply with OAR chapter 340, the Standards of Quality for Public Waters of Oregon; all individual permits also specify water quality provisions for the project.

§ 230.25 Salinity gradie

(a) Salinity gradients form where salt water from the ocean meets and mixes with fresh water from land. (b) Possible loss of environmental characteristics and values: Obstructions which divert or restrict flow of either fresh or salt water may change existing salinity gradients. For example, partial blocking of the entrance to an estuary or river mouth that significantly restricts the movement of the salt water into and out of that area can effectively lower the volume of salt water available for mixing within that estuary. The downstream migration of the salinity gradient can occur, displacing the maximum sedimentation zone and requiring salinity-dependent aquatic biota to adjust to the new conditions, move to new locations if possible, or perish. In the freshwater zone, discharge operations in the upstream regions can have equally adverse impacts. A significant reduction in the volume of fresh water moving into an estuary below that	OAR 141-085-0765 ORS 196.825(5) .	For projects where there are unavoidable impacts to waters other than wetlands or tidal waters, compensatory non-wetland mitigation (CNWM) will be required. Process includes a CNWM functional assessment, including direct measurement or observation of the indicators for the following functions and values: hydrologic; geomorphic, biological; and chemical and nutrient. Applicant must demonstrate that the plan will replace or provide comparable substitute water resources of this state. DSL may impose such conditions as the director considers necessary to carry out the purposes of ORS 196.805 and 196.830 and 196.825(1), and to provide mitigation for the	Individual Permit Form includes a condition that all work done under the permit must comply with OAR chapter 340, the Standards of Quality for Public Waters of Oregon; all individual permits also specify water quality provisions for the project.

which is considered normal can affect the location and type of mixing thereby changing the characteristic salinity patterns. The resulting changed circulation pattern can cause the upstream migration of the salinity gradient displacing the maximum sedimentation zone. This migration may affect those organisms that are adapted to freshwater environments. It may also affect municipal water supplies.		reasonably expected adverse effects of project development.	

Subpart D-Potential Impacts on Biological Characteristics of the Aquatic Ecosystem
§ 230.30 Threatened and endangered species.

(a) An endangered species is a plant or animal in danger of extinction throughout all or a significant portion of its range. A threatened species is one in danger of becoming an endangered species in the foreseeable future throughout all or a significant portion of its range. Listings of threatened and endangered species as well as critical habitats are maintained by some individual States and by the U.S. Fish and Wildlife Service of the Department of the Interior (codified annually at 50 CFR § 17.11). The Department of Commerce has authority over some threatened and endangered marine mammals, fish and reptiles. (b) Possible loss of values: The major potential impacts on threatened or endangered species from the discharge of dredged or fill material include: (1) Covering or otherwise directly killing species;	ORS 196.825(1) ORS 196.825(3)(i)	Permit will be issued if the project described in the application is consistent with protection, conservation and best use of the water resources of this state as specified in ORS 196.600 through 196.905; and the permit would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation. In determining whether to issue a permit in an area that is not subject to an approved wetland conservation plan, the director will consider whether the applicant has provided all practicable mitigation to reduce the adverse effects. In determining whether the applicant has provided all practicable	

(2) The impairment or destruction of habitat to which these species are limited. Elements of the aquatic habitat which are particularly crucial to the continued survival of some threatened or endangered species include adequate good quality water, spawning and maturation areas, nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory species. Each of these elements can be adversely affected by changes in either the normal water conditions for clarity, chemical content, nutrient balance, dissolved oxygen, pH, temperature, salinity, current patterns, circulation and fluctuation, or the physical removal of habitat; and (3) Facilitating incompatible activities. (c) Where consultation with the Secretary of the Interior occurs under section 7 of the Endangered Species Act, the conclusions of the Secretary concerning the impact(s) of the discharge on threatened and endangered species and their habitat shall be considered final.		mitigation, the director shall consider the findings regarding wetlands set forth in ORS 196.668 and whether the proposed mitigation advances the policy objectives for the protection of wetlands set forth in ORS 196.672.	

§ 230.31 Fish, crustaceans, mollusks, and other aquatic organisms in the food web.

(a) Aquatic organisms in the food web include, but are not limited to, finfish, crustaceans, mollusks, insects, annelids, planktonic organisms, and the plants and animals on which they feed and depend upon for their needs. All forms and life stages of an organism, throughout its geographic range, are included in this category. (b) Possible loss of values: The discharge of dredged or fill material can variously affect	ORS 196.668	Eleven legislative findings regarding wetlands, including: wetlands provide a natural means of flood and storm damage protection; wetlands provide essential habitats for a major portion of the state's fish and wildlife, for waterfowl using the Pacific Flyway, and rearing of salmon and other anadromous and	

populations of fish, crustaceans, mollusks and other food web organisms through the release of contaminants which adversely affect adults, juveniles, larvae, or eggs, or result in the establishment or proliferation of an undesirable competitive species of plant or animal at the expense of the desired resident species. Suspended particulates settling on attached or buried eggs can smother the eggs by limiting or sealing off their exposure to oxygenated water. Discharge of dredged and fill material may result in the debilitation or death of sedentary organisms by smothering, exposure to chemical contaminants in dissolved or suspended form, exposure to high levels of suspended particulates, reduction in food supply, or alteration of the substrate upon which they are dependent. Mollusks are particularly sensitive to the discharge of material during periods of reproduction and growth and development due primarily to their limited mobility. They can be rendered unfit for human consumption by tainting, by production and accumulation of toxins, or by ingestion and retention of pathogenic organisms, viruses, heavy metals or persistent synthetic organic chemicals. The discharge of dredged or fill material can redirect, delay, or stop the reproductive and feeding movements of some species of fish and crustacea, thus preventing their aggregation in accustomed places such as spawning or nursery grounds and potentially leading to reduced populations. Reduction of detrital feeding species or other	ORS 196.672(1) and (4)	resident fish; wetlands act as accumulation areas for sediment and help maintain clean water; wetlands provide significant opportunities for research, recreation and education and provide scenic diversity and aesthetic value; much of the state's original wetlands have been altered; there is continuing development pressure on wetlands; there is often conflicts between wetland protection and other resource values and uses; uncoordinated regulation of wetlands can cause confusion, frustration and unreasonable delay and uncertainty for the general public; and wetland management is a matter of state concern. State policy includes: promote the protection, conservation and best use of wetland resources, their functions and values through the integration and close coordination of statewide planning goals, local comprehensive plans and state and federal regulatory programs; maintain a stable resource base of wetlands through the mitigation of losses of wetland resources and the adoption of the procedural mitigation standard currently used by federal agencies.	

representatives of lower trophic levels can impair the flow of energy from primary consumers to higher trophic levels. The reduction or potential elimination of food chain organism populations decreases the overall productivity and nutrient export capability of the ecosystem.	OAR 141-085-0510(40) ORS 196.682(1)	"Functions and values" defined. "Functions" are the ecological characteristics or processes associated with a water of the state. "Values" are the societal benefits derived from the ecological characteristics and processes. In determining whether to issue a permit in an area that is subject to an approved wetland conservation plan, the director will determine whether the permit would be consistent with the wetland conservation plan or could be conditioned to be consistent with the plan.	Note: Wetland Conservation Plans are submitted, reviewed, and potentially approved pursuant to ORS 196.678 through 196.684.

§ 230.32 Other wildlife.

(a) Wildlife associated with aquatic ecosystems are resident and transient mammals, birds, reptiles, and amphibians. (b) Possible loss of values: The discharge of dredged or fill material can result in the loss or change of breeding and nesting areas, escape cover, travel corridors, and preferred food sources for resident and transient wildlife species associated with the aquatic ecosystem. These adverse impacts upon wildlife habitat may result from changes in water levels, water flow and circulation, salinity, chemical content, and substrate characteristics and elevation. Increased water turbidity can adversely affect wildlife species which rely upon sight to feed and disrupt the respiration and feeding of certain aquatic wildlife and food chain organisms. The availability of contaminants from the discharge of dredged or fill material may lead to the bioaccumulation of such contaminants in wildlife. Changes in such physical and chemical factors of the environment may favor the introduction of undesirable plant and animal species at the expense of resident species and communities. In some aquatic environments lowering plant and animal species diversity may disrupt the normal functions of the ecosystem and lead to reductions in overall biological productivity.	ORS 196.825(4) OAR 141-085-0550(5)(h) OAR 141-085-0550(5)(i) OAR 141-085-0550(5)(m) OAR 141-085-0680(2)	Permits may be issued in estuaries for nonwater dependent use only if the project is for a public use and would satisfy a public need that outweighs harm to navigation, fishery, and recreation. Application must include a written analysis of the potential changes that the project may make to the hydrologic characteristics of the waters of this state, and an explanation of measures taken to avoid or minimize any adverse impacts of those changes (e.g. impeding, restricting or increasing flows, relocating or redirecting flow, and potential flooding or erosion downstream of the project). Application must include a description of the existing biological and physical characteristics of the water resources, along with the identification of the adverse impacts that will result from the project. Application must include any information known by the applicant concerning the presence of any federal or state listed species. For projects where impacts to wetlands or tidal waters cannot be avoided, compensatory wetland	

		or tidal mitigation (CWM) will be required to compensate for the reasonably expected adverse impacts in fulfillment of the following principal objectives: replace functions and values lost at the removal-fill site; provide local replacement for locally important functions and values, where appropriate; enhance, restore, create or preserve wetlands or tidal areas that are self-sustaining and minimize long-term maintenance needs; ensure the siting of CWM in ecologically suitable locations; minimize temporal loss of wetlands and tidal waters and their functions and values.	
	OAR 141-085-0685	A functions and values assessment is required for wetlands and tidal waters.	
	OAR 141-085-0690(1)	The compensatory wetland or tidal mitigation (CWM) must have the capability to replace wetland or tidal water types impacted by the project and the functions and values of the impacted wetland or tidal waters.	
	OAR 141-085-0705	A compensatory wetland or tidal mitigation (CWM) plan must be submitted to the department; the department reviews the plan for sufficiency; the approved plan becomes an enforceable part of the permit.	

	OAR 141-085-0765	For projects where there are unavoidable impacts to waters other than wetlands or tidal waters, compensatory non-wetland mitigation (CNWM) will be required. Process includes a CNWM functional assessment, including direct measurement or observation of the indicators for the following functions and values: hydrologic; geomorphic, biological; and chemical and nutrient. Applicant must demonstrate that the plan will replace or provide comparable substitute water resources of this state.	

Subpart E-Potential Impacts on Special Aquatic Sites
§ 230.40-45 (combined as they are similarly addressed)

230.40 Sanctuaries and refuges. 230.41 Wetlands. 230.42 Mud flats. 230.43 Vegetated shallows. 230.44 Coral reefs. 230.45 Riffle and pool complexes.	ORS 196.825(1)	Permit will be issued if the project described in the application is consistent with protection, conservation and best use of the water resources of this state as specified in ORS 196.600	

Commented [PB28]:
Not sure if this needs to be singular?

		through 196.905; and the permit would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.	
	ORS 196.825(3)(i)	In determining whether to issue a permit in an area that is not subject to an approved wetland conservation plan, the director will consider whether the applicant has provided all practicable mitigation to reduce the adverse effects. In determining whether the applicant has provided all practicable mitigation, the director shall consider the findings regarding wetlands set forth in ORS 196.668 and whether the proposed mitigation advances the policy objectives for the protection of wetlands set forth in ORS 196.672.	
	ORS 196.668	Eleven legislative findings regarding wetlands, including: wetlands provide a natural means of flood and storm damage protection; wetlands provide essential habitats for a major portion of the state's fish and wildlife, for waterfowl using the Pacific Flyway, and rearing of salmon and other anadromous and resident fish; wetlands act as accumulation areas for sediment	

		and help maintain clean water; wetlands provide significant opportunities for research, recreation and education and provide scenic diversity and aesthetic value; much of the state's original wetlands have been altered; there is continuing development pressure on wetlands; there is often conflicts between wetland protection and other resource values and uses; uncoordinated regulation of wetlands can cause confusion, frustration and unreasonable delay and uncertainty for the general public; and wetland management is a matter of state concern.	
	ORS 196.672(1) and (4)	State policy includes: promote the protection, conservation and best use of wetland resources, their functions and values through the integration and close coordination of statewide planning goals, local comprehensive plans and state and federal regulatory programs; maintain a stable resource base of wetlands through the mitigation of losses of wetland resources and the adoption of the procedural mitigation standard currently used by federal agencies.	

	OAR 141-085-0510(40)	"Functions and values" defined. "Functions" are the ecological characteristics or processes associated with a water of the state. "Values" are the societal benefits derived from the ecological characteristics and processes.	
	ORS 196.682(1)	In determining whether to issue a permit in an area that is subject to an approved wetland conservation plan, the director will determine whether the permit would be consistent with the wetland conservation plan or could be conditioned to be consistent with the plan.	
	ORS 196.825(4)	Permits may be issued in estuaries for nonwater dependent use only if the project is for a public use and would satisfy a public need that outweighs harm to navigation, fishery, and recreation.	
	OAR 141-085-0550(5)(h)	Application must include a written analysis of the potential changes that the project may make to the hydrologic characteristics of the waters of this state, and an explanation of measures taken to avoid or minimize any adverse impacts of those changes (e.g. impeding,	

		restricting or increasing flows, relocating or redirecting flow, and potential flooding or erosion downstream of the project).	
	OAR 141-085-0550(5)(i)	Application must include a description of the existing biological and physical characteristics of the water resources, along with the identification of the adverse impacts that will result from the project.	
	OAR 141-085-0680(2)	For projects where impacts to wetlands or tidal waters cannot be avoided, compensatory wetland or tidal mitigation (CWM) will be required to compensate for the reasonably expected adverse impacts in fulfillment of the following principal objectives: replace functions and values lost at the removal-fill site; provide local replacement for locally important functions and values, where appropriate; enhance, restore, create or preserve wetlands or tidal areas that are self-sustaining and minimize long-term maintenance needs; ensure the siting of CWM in ecologically suitable locations; minimize temporal loss of wetlands and tidal waters and their functions and values.	

	OAR 141-085-0685	A functions and values assessment is required for wetlands and tidal waters.	
	OAR 141-085-0690(1)	The compensatory wetland or tidal mitigation (CWM) must have the capability to replace wetland or tidal water types impacted by the project and the functions and values of the impacted wetland or tidal waters.	
	OAR 141-085-0705	A compensatory wetland or tidal mitigation (CWM) plan must be submitted to the department; the department reviews the plan for sufficiency; the approved plan becomes an enforceable part of the permit.	
	OAR 141-085-0765	For projects where there are unavoidable impacts to waters other than wetlands or tidal waters, compensatory non-wetland mitigation (CNWM) will be required. Process includes a CNWM functional assessment, including direct measurement or observation of the indicators for the following functions and values: hydrologic; geomorphic, biological; and chemical and nutrient. Applicant must demonstrate that the plan will replace or provide comparable	

		substitute water resources of this state.	

Subpart F-Potential Effects on Human Use Characteristics
§ 230.50 Municipal and private water supplies.

40 CFR 230.50 to 230.54 Potential effects on Human Use Characteristics; *municipal and private water supplies, recreational and commercial fisheries, water-related recreation, aesthetics, and parks, national and historic monuments, nationals seashores, wilderness areas, research sites, and similar preserves*. *Summary:* The effects described in 40 CFR 230.50 to 230.54 should be considered in making the factual determinations and the findings of compliance or non-compliance in 40 CFR 230.10 to 230.12. *Detail*: 40 CFR 230.50 *Municipal and private water supplies* consist of surface water or ground water which is directed to the intake of a municipal or private water supply system. 40 CFR 230.51 *Recreational and commercial fisheries* consist of harvestable fish, crustaceans, shellfish, and other aquatic organisms used by man. 40 CFR 230.52 *Water-related recreation* encompasses activities undertaken for amusement and relaxation. Activites encompass two broad categories of use: consumptive (e.g hunting and fishing) and non-consumptive (e.g. canoeing and sightseeing). 40 CFR 230.53 *Aesthetics* associated with the aquatic ecosystem consist of the	ORS 196.805(1)	Statement of Policy includes: Streams, lakes, bays, estuaries and other bodies of water in this state, including not only water and materials for domestic, agricultural and industrial use but also habitats and spawning areas for fish, avenues for transportation and sites for commerce and public recreation, are vital to the economy and well-being of this state and its people.	
	ORS 196.825(1)	Permit will be issued if the project described in the application is consistent with protection, conservation and best use of the water resources of this state as specified in ORS 196.600 through 196.905; and the permit would not unreasonably interfere with the paramount policy of this state to preserve the use of its waters for navigation, fishing and public recreation.	
	ORS 196.825(3)(e) and (f)	In determining whether to issue a permit in an area that is not subject to an approved wetland conservation plan, the director will consider whether the fill and removal conforms to sound policies of conservation and	

perception of beauty by one or a combination of the senses of sight, hearing, touch, and smell. Aesthetics of aquatic ecosystems apply to the quality of life enjoyed by the general public and property owners. 40 CFR 230.54 *Parks, national and historic monuments, nationals seashores, wilderness areas, research sites, and similar preserves* consist of areas designated under federal and state laws or local ordinances to be managed for their aesthetic, educational, historical, recreational, or scientific value. Note: For each of the sections, the fed regs describe how affecting the resource leads to possible loss of environmental characteristics and values.		would not interfere with public health and safety; and whether the fill and removal is in conformance with existing public uses of the waters.	
	ORS 196.825(3)(g)	In determining whether to issue a permit in an area that is not subject to an approved wetland conservation plan, the director will consider whether the proposed fill or removal is compatible with the acknowledged comprehensive plan and land use regulations for the area where the proposed fill or removal is to take place or can be conditioned on a future local approval to meet this criterion.	
	ORS 196.825(3)(i)	In determining whether to issue a permit in an area that is not subject to an approved wetland conservation plan, the director will consider whether the applicant has provided all practicable mitigation to reduce the adverse effects of the proposed fill or removal in the manner set forth in ORS 196.800 (see definitions of "mitigation" and "practicable").	
	ORS 196.682(1)	In determining whether to issue a permit in an area that is subject to an approved wetland conservation plan, the director will determine whether the permit would be consistent with the wetland	Note: Wetland Conservation Plans are submitted, reviewed, and potentially approved pursuant to ORS 196.678 through 196.684.

		conservation plan or could be conditioned to be consistent with the plan.	

Subpart G-Evaluation and Testing
§ 230.60 General evaluation of dredged or fill material.

40 CFR 230.60 to 230.61 Evaluation and Testing; *General evaluation of dredged or fill material; chemical, biological, and physical evaluation and testing.* *Summary:* The purpose of the evaluation and testing outlined here is to provide information to reach the determinations required by 40 CFR 230.11. Wehre the results of prior evaluations, chemical and biological tests, scientific research, and experience can provide information helpful in making a determination, these should be used. Such prior results may make new testing unnecessary. The information used shall be documented. *Detail*: 40 CFR 230.60 The process of the *general evaluation of dredged or fill material* includes: (a) If the evaluation under (b) indicates the dredged or fill material is not a carrier of contaminants, then the required determinations pertaining to the presence and effect of contaminants can be made without testing. Dredged or fill material is most likely to be free of pollutants where it is composed primarily of sand, gravel, or other naturally occurring inert material, such as in areas of high current or wave energy. However, when such material is discolored or contains other indications that	OAR 141-085-0550(5)(h)	Application must include a written analysis of the potential changes that the project may make to the hydrologic characteristics of the waters of this state, and an explanation of measures taken to avoid or minimize any adverse impacts of those changes (e.g. impeding, restricting or increasing flows, relocating or redirecting flow, and potential flooding or erosion downstream of the project).	
	OAR 141-085-0550(5)(i)	Application must include a description of the existing biological and physical characteristics of the water resources, along with the identification of the adverse impacts that will result from the project.	
	OAR 141-085-0550(7)	The Department may request the applicant to include additional information in the application as necessary to make an informed decision on whether or not to issue the authorization.	

contaminants may be present, further inquiry should be made. (b) The extraction site shall be examined in order to assess whether it is sufficiently removed from sources of pollution to provide reasonable assurance that the proposed discharge material is not a carrier of contaminants. Factors to consider include but are not limited to: (1) Potential routes of contaminants or contaminated sediments to the extraction site, based on hydographic or other maps, aerial photography, or other materials that show watercourses, surface relief, proximity to tidal movement, private and public roads, locations of buildings, municipal and industrial areas, and agricultural or forest lands; (2) Pertinent results from tests previously carried out on the material at the extraction site, or carried out on similar material for other permitted projects in the vicinity. Tests from other sites may be relied on only if no changes have occurred at the extraction sites to render the results irrelevant; (3) Any potential for significant introduction of persistent pesticides from land runoff or percolation; (4) Any records of spills or disposal of petroleum products or designated hazardous substances; (5) Information in state, federal, and local records indicating significant introduction of pollutants from industries, municipalities, or other sources, including types and amounts of water materials discharged along the potential routes of contaminants to the extraction site; and (6) Any possibility of the presence of substantial			

natural deposits of minerals or other substances which could be released to the aquatic environment in harmful quantities by man-induced discharge activities. (c) Where the discharge site is adjacent to the extraction site and subject to the same sources of contaminants, and materials at the two sites are substantially similar, the fact that the material to be discharged may be a carrier of contaminants is not likely to result in degradation of the disposal site. In such circumstances, when dissolved material and suspended particulates can be controlled to prevent carrying pollutants to less contaminated areas, testing will not be required. (d) Even if the evaluation under (b) leads to the conclusion that there is a high probability that the material proposed for discharge is a carrier of contaminants, testing may not be necessary if constraints are available to reduce contamination to acceptable levels within the disposal site to prevent contaminants from being transported beyond the boundaries of the disposal site. However, even if tests are not performed, the agency must still determine the probable impact of the operation on the receiving aquatic ecosystem. Any decision not to test must be explained in the determinations made under 40 CFR 230.11. 40 CFR 230.61 (Note: There may be revised guidelines for *chemical, biological, and physical evaluation and testing* that replace this regulation).			

This section provides some guidance in determining which test or evaluation procedures are appropriate in a given case. Details provided in fed regs.			

Subpart H-Actions to Minimize Adverse Effects (These sections give examples of ways to minimize adverse effects of a project. NA?)

§ 230.70 Actions concerning the location of the discharge.

40 CFR 230.70 to 230.77 Actions to Minimize Adverse Effects; ***actions concerning the location of the discharge; actions concerning the material to be discharged; actions controlling the material after discharge; actions affecting the method of dispersion; actions related to technology; actions affecting plant and animal populations; actions affecting human use; and other actions.*** *Summary:* Provides list of some of the actions which can be undertaken to minimize the adverse effects of discharges of dredged or fill material. Additional criteria for compensation measures are provided in 40 CFR 230.91 to 98. *Detail:* 40 CFR 230.70 *Actions concerning the locations of the discharge:* The effects of a discharge can be minimized by the choice of the disposal site. Some of the ways to accomplish this are by: (a) locating and confining the discharge to minimize smothering of organisms; (b) designing the discharge to avoid a disruption of periodic water inundation patterns; (c) selecting a disposal site that has been used previously for dredged material discharge; (d) selecting a disposal site at which the substrate is	ORS 196.825(5)	The Director may impose conditions: If the director issues a permit, the director may impose such conditions as the director considers necessary to carry out the purposes of ORS 196.805 (statement of state policy) and ORS 196.830 (estuary considerations) and subsection (1) of this section (two ultimate determinations for sites that are not within an area covered by a wetland conservation plan) and to provide mitigation for the reasonably expected adverse effects of project development. In formulating such conditions the director may request comment from public bodies, federal agencies, and tribal governments affected by the permit. The director shall impose, as conditions to any permit, general authorization or wetland conservation plan, measures to provide mitigation for the reasonably expected adverse effects of project development. Compensatory mitigation shall be	

composed of material similar to that being discharged; (e) selecting the disposal site, the discharge point, and the method of discharge to minimize the extent of any plume; (f) designing the discharge of dredged or fill material to minimize or prevent the creation of standing bodies of water in areas of normally fluctuating water levels, and minimize or prevent the drainage of areas subject to such fluctuations.		limited to replacement of the functions and values of the impacted water resources of this state.	
40 CFR 230.71 *Actions concerning the material to be discharged:* The effects of a discharge can be minimized by treatment of, or limitations on the material itself, such as: (a) disposal of dredged material in such a manner that physiochemical conditions are maintained and the potency and availability of pollutants are reduced; (b) limiting the solid, liquid, and gaseous components of material to be discharged at a particular site; (c) adding treatment substances to the discharge material; and (d) utilizing chemical flocculants to enhance the deposition of suspended particulates in diked disposal sites. 40 CFR 230.72 *Actions controlling the material after discharge:* The effects of the dredged or fill material after discharge may be controlled by: (a) Selecting discharge methods and disposal sites where the potential for erosion, slumping or leaching of materials into the surrounding aquatic ecosystem will be reduced, including but not limited to: using containment levees, sediment basins, and cover crops to reduce erosion; or using lined containment areas to reduce leaching; (b) capping in-place contaminated material with	ORS 196.682(1)	In determining whether to issue a permit in an area that is subject to an approved wetland conservation plan, the director will determine whether the permit would be consistent with the wetland conservation plan or could be conditioned to be consistent with the plan.	Note: Wetland Conservation Plans are submitted, reviewed, and potentially approved pursuant to ORS 196.678 through 196.684.

clean material or selectively discharging the most contaminated material first to be capped with the remaining material; (c) maintaining and containing discharged material properly to prevent point and non-point sources of pollution; and (d) timing the discharge to minimize impact, for instance during periods of unusual high water flows, wind, wave, and tidal actions. 40 CFR 230.73 *Actions affecting the method of dispersion.* The effects of a discharge can be minimized by the manner in which it is dispersed, such as: (a) distributing the dredged material widely in a thin layer at the disposal site to maintain natural substrate contours and elevation; (b) orienting a dredged or fill material mound to minimize undesirable obstruction of the water current or circulation pattern, and utilizing natural bottom contours to minimize the size of the mound; (c) using silt screens or other appropriate methods to confine suspended particulate/turbidity to a small area where settling or removal can occur; (d) making use of currents and circulation patterns to mix, disperse and dilute the discharge; (e) using a submerged diffuser system, by submerging pipeline discharges or otherwise releasing materials near the bottom; (f) selecting sites or managing discharges to confine and minimize the release of suspended particulates to give decreased turbidity levels and to maintain light penetration for organisms; (g) setting limitations on the amount of material to be discharged per unit of time or volume of receiving waters.			

40 CFR 230.74 *Actions related to technology*. The applicant should consider: (a) Using appropriate equipment or machinery; (b) Employing appropriate maintenance and operation on equipment or machinery, including adequate training, staffing, and working procedures; (c) using machinery and techniques that are especially designed to reduce damage to wetlands, including machines equipped with devices that scatter rather than mound excavated materials, machines with specially designed wheels or tracks, and the use of mats under heavy machines to reduce wetland surface compaction and rutting; (d) designing access roads and channel spanning structures using culverts, open channels, and diversions that will pass both low and high water flows, accommodate fluctuating water levels, and maintain circulation and faunal movement; (e) employing appropriate methods of and machinery for transport of the material for discharge. 40 CFR 230.75 *Actions affecting plant and animal populations.* Minimization of adverse effects on populations of plants and animals can be achieved by: (a) Avoiding changes in water current and circulation patterns which would interfere with the movement of animals; (b) Selecting sties or managing discharges to prevent or avoid creating habitat conducive to the development of undesirable predators or species which have a competitive edge ecologically over indigenous plants or animals;			

(c) Avoiding sites having unique habitat or other value, including habitat of threatened or endangered species; (d) Using planning and construction practices to institute habitat development and restoration to produce a new or modified environmental state of higher ecological value by displacement of some or all of the existing environmental characteristics. Habitat development and restoration techniques can be used to minimize adverse impacts and to compensate for destroyed habitat. Additional measures are in 40 CFR 230.91 to 230.98. Use techniques that have been demonstrated to be effective in circumstances similar to those under consideration wherever possible. Where proposed development and restoration techniques have not yet advanced to the pilot demonstration stage, initiate their use on a small scale to allow corrective action if unanticipated adverse impacts occur; (e) Timing discharge to avoid spawning or migration seasons and other biologically critical time periods; and (f) Avoiding the destruction of remnant natural sites within areas already affected by development. 40 CFR 230.76 *Actions affecting human use.* Minimization of adverse effects on human use potential may be achieved by: (a) preventing or minimizing any potential damage to aesthetically pleasing features of the aquatic site, particularly with respect to water quality; (b) selecting disposal sites that are not valuable as natural aquatic areas; (c) timing the discharge to avoid seasons or periods			

when human recreational activity is most important; (d) following discharge procedures which avoid or minimize the disturbance of aesthetic features of an aquatic site or ecosystem; (e) selecting sites that will not be detrimental or increase incompatible human activity, or require the need for frequent dredge or fill maintenance activity in remote fish and wildlife areas; and (f) locating the disposal site outside of the vicinity of a public water supply intake. 40 CFR 230.77 *Other actions.* In the case of fills, controlling runoff and other discharges from activities to be conducted on the fill; (b) in the case of dams, designing water releases to accommodate the needs of fish and wildlife; (c) in dredging projects with federal funding not through the Corps, maintain desired water quality of the return discharge on scientifically defensible pollutant concentration levels in addition to any applicable water quality standards; and (d) when a significant ecological change in the aquatic environment is proposed by the discharge of dredged or fill material, the agency should consider the ecosystem that will be lost as well as the environmental benefits of the new system.			

Subpart I Planning to Shorten Permit Processing Time
§ 23

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40 CFR 230.80 Planning to Shorten Permit Processing Time; *advanced identification of disposal areas.* *Summary:*	ORS 196.795	The Department of State Lands shall continue to pursue methods to streamline the process for administering permits for the removal of material from the bed	

In order to streamline permit process times, EPA and DSL may identify possible future disposal sites and areas unsuitable for disposal site specification. *Detail:* (a) Consistent with 40 CFR 230 (the 404(b)(1) Guidelines), EPA and DSL, on their own initiative or at the request of any party, may identify sites which will be considered as: possible future disposal sites, including existing disposal sites and non-sensitive areas; or areas generally unsuitable for disposal site specification. (b) Identification of a site as a possible future site should not be deemed to constitute a permit or the specification of a disposal site. Identification of a site as unsuitable should not be deemed as prohibiting applications for permits. Either type of identification constitutes information to facilitate individual or general permit application processing. (c) An appropriate public notice of the proposed identification of such areas shall be issued. (d) In the identification process, EPA and DSL shall consider the likelihood that use of the area in question for dredged or fill material disposal will comply with 40 CFR 230, including a review of water resources management data. (e) DSL should maintain a public record of the identified areas and a written statement of the basis for identification.		or banks of any waters of this state or for filling the waters of this state, reducing paperwork, eliminating duplication, increasing certainty and timeliness and enhancing resource protection.	

Subpart J Compensatory Mitigation for Losses of Aquatic Resources
§ 230.91 Purpose and general considerations.

(a) Purpose (1) The purpose of this subpart is to establish standards and criteria for the use of all types of compensatory mitigation, including on-site and off-site permittee-responsible mitigation, mitigation banks, and in-lieu fee mitigation to offset unavoidable impacts to waters of the United States authorized through the issuance of permits by the U.S. Army Corps of Engineers (Corps) pursuant to section 404 of the Clean Water Act (33 U.S.C. 1344). This subpart implements section 314(b) of the 2004 National Defense Authorization Act (Pub. L. 108-136), which directs that the standards and criteria shall, to the maximum extent practicable, maximize available credits and opportunities for mitigation, provide for regional variations in wetland conditions, functions, and values, and apply equivalent standards and criteria to each type of compensatory mitigation. This subpart is intended to further clarify mitigation requirements established under the Corps and	ORS 196.605 *ORS 196.800(9) and OAR 141-085-0510(53)	Purpose of Oregon's mitigation-related statutes is to: promote maintenance and conservation of water resources of the state; improve cooperative efforts; offset losses of the functions and values of the state's water resources of this state caused by activities that otherwise comply with state and federal law in order to create, restore, enhance or preserve those functions and values; maintain and encourage a predictable and efficient regulatory framework for environmentally acceptable development; provide an option for accomplishing off-site compensatory mitigation when on-site compensatory mitigation is not practicable; and allow the use of mitigation banks to offset adverse effects from removal or fill activities on the waters of this state. (9) "Mitigation" means the reduction of adverse effects of a proposed project by considering, in the following order: (a) Avoiding the effect altogether by not taking a certain action or	

EPA regulations at 33 CFR part 320 and this part, respectively. (2) This subpart has been jointly developed by the Secretary of the Army, acting through the Chief of Engineers, and the Administrator of the Environmental Protection Agency. From time to time guidance on interpreting and implementing this subpart may be prepared jointly by EPA and the Corps at the national or regional level. No modifications to the basic application, meaning, or intent of this subpart will be made without further joint rulemaking by the Secretary of the Army, acting through the Chief of Engineers and the Administrator of the Environmental Protection Agency, pursuant to the Administrative Procedure Act (5 U.S.C. 551 et seq.). (b) Applicability. This subpart does not alter the circumstances under which compensatory mitigation is required or the definition of "waters of the United States," which is provided at § 230.3(s). Use of resources as compensatory mitigation that are not otherwise subject to regulation under section 404 of the Clean Water Act does not in and of itself make them subject to such regulation.	ORS 196.600(1) and OAR 141-085-0510(16)	parts of an action; (b) Minimizing the effect by limiting the degree or magnitude of the action and its implementation; (c) Rectifying the effect by repairing, rehabilitating or restoring the affected environment; (d) Reducing or eliminating the effect over time by preservation and maintenance operations during the life of the action by monitoring and taking appropriate corrective measures; and (e) Compensating for the effect by creating, restoring, enhancing or preserving substitute functions and values for the waters of this state. "Compensatory mitigation" means activities conducted by a permittee or third party to create, restore, enhance or preserve the functions and values of the water resources of this state to compensate for the removal-fill related adverse effects of project development to waters of this state or to resolve violations of ORS 196.800 to 196.905. Compensatory mitigation for removal-fill activities does not affect permit requirements of other state departments.	

(c) Sequencing. (1) Nothing in this section affects the requirement that all DA permits subject to section 404 of the Clean Water Act comply with applicable provisions of this part. (2) Pursuant to these requirements, the district engineer will issue an individual section 404 permit only upon a determination that the proposed discharge complies with applicable provisions of 40 CFR part 230, including those which require the permit applicant to take all appropriate and practicable steps to avoid and minimize adverse impacts to waters of the United States. Practicable means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes. Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. (3) Compensatory mitigation for unavoidable impacts may be required to ensure that an activity requiring a section 404 permit complies with the Section 404(b)(1) Guidelines. During the	*ORS 196.800(11) and OAR 141-085-0510(69) OAR 141-085-0510(40)	"Practicable" means capable of being accomplished after taking into consideration the cost, existing technology and logistics with respect to the overall project purpose. "Functions and Values" are those ecological characteristics or processes associated with a water of this state and the societal benefits derived from those characteristics. The ecological characteristics are "functions," whereas the associated societal benefits are "values."	

404(b)(1) Guidelines compliance analysis, the district engineer may determine that a DA permit for the proposed activity cannot be issued because of the lack of appropriate and practicable compensatory mitigation options. (d) Accounting for regional variations. Where appropriate, district engineers shall account for regional characteristics of aquatic resource types, functions and services when determining performance standards and monitoring requirements for compensatory mitigation projects. (e) Relationship to other guidance documents. (1) This subpart applies instead of the "Federal Guidance for the Establishment, Use, and Operation of Mitigation Banks," which was issued on November 28, 1995, the "Federal Guidance on the Use of In-Lieu Fee Arrangements for Compensatory Mitigation Under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act," which was issued on November 7, 2000, and Regulatory Guidance Letter 02-02, "Guidance on Compensatory Mitigation Projects for Aquatic Resource Impacts Under the Corps Regulatory Program Pursuant to Section 404 of the

Clean Water Act and Section 10 of the Rivers and Harbors Act of 1899" which was issued on December 24, 2002. These guidance documents are no longer to be used as compensatory mitigation policy in the Corps Regulatory Program. (2) In addition, this subpart also applies instead of the provisions relating to the amount, type, and location of compensatory mitigation projects, including the use of preservation, in the February 6, 1990, Memorandum of Agreement (MOA) between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines. All other provisions of this MOA remain in effect.			

§ 230.93 General compensatory mitigation requirements

(a) General considerations (1) Fundamental objective is to offset environmental losses…
(2) Compensatory mitigation may be performed using the methods of restoration, enhancement, establishment, and in certain circumstances preservation. Restoration should generally be the first option…
(3) Compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. All compensatory mitigation projects must comply with the standards in this part, if they are to be used to provide compensatory mitigation for activities authorized by DA permits, regardless of whether they are sited on public or private lands and whether the sponsor is a governmental or private entity.
(b) Type and location of compensatory mitigation (1) When considering options for successfully providing the required compensatory mitigation, the district engineer

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shall consider the type and location options in the order presented in paragraphs (b)(2) through (b)(6) of this section… (Mitigation hierarchy) (2) Mitigation bank credits (3) In-lieu fee program credits. (4) Permittee-responsible mitigation under a watershed approach. (5) Permittee-responsible mitigation through on-site and in-kind mitigation. (c) Watershed approach to compensatory mitigation (1) The district engineer must use a watershed approach to establish compensatory mitigation requirements in DA permits to the extent appropriate and practicable… (2) Considerations. (3) Information Needs. (4) Watershed Scale. (d) Site selection (e) Mitigation type (f) Amount of compensatory mitigation (g) Use of mitigation banks and in-lieu fee programs (h) Preservation (i) Buffers. District engineers may require the restoration, establishment, enhancement, and preservation, as well as the maintenance, of riparian areas and/or buffers around aquatic			

resources where necessary to ensure the long-term viability of those resources. Buffers may also provide habitat or corridors necessary for the ecological functioning of aquatic resources. If buffers are required by the district engineer as part of the compensatory mitigation project, compensatory mitigation credit will be provided for those buffers.
(j) Relationship to other federal, tribal, state, and local programs
(1) Compensatory mitigation projects for DA permits may also be used to satisfy the environmental requirements of other programs, such as tribal, state, or local wetlands regulatory programs, other federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations: …
(2) Except for projects undertaken by federal agencies, or where federal funding is specifically authorized to provide compensatory mitigation, federally-funded aquatic resource restoration or conservation projects undertaken for purposes

other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by DA permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs in order to maximize the overall ecological benefits of the restoration or conservation project.

(3) Compensatory mitigation projects may also be used to provide compensatory mitigation under the Endangered Species Act or for Habitat Conservation Plans, as long as they comply with the requirements of paragraph (j)(1) of this section.

(k) Permit conditions (1) The compensatory mitigation requirements for a DA permit, including the amount and type of compensatory mitigation, must be clearly stated in the special conditions of the individual permit or general permit verification (see 33 CFR 325.4

and 330.6(a)). The special conditions must be enforceable. (2) For an individual permit that requires permittee-responsible mitigation, the special conditions must: (i) Identify the party responsible for providing the compensatory mitigation; (ii) Incorporate, by reference, the final mitigation plan approved by the district engineer; (iii) State the objectives, performance standards, and monitoring required for the compensatory mitigation project, unless they are provided in the approved final mitigation plan; and (iv) Describe any required financial assurances or long-term management provisions for the compensatory mitigation project, unless they are specified in the approved final mitigation plan. (3) For a general permit activity that requires permittee-responsible compensatory mitigation, the special conditions must describe the compensatory mitigation proposal, which may be either conceptual or detailed. The general permit verification must also include a special condition that states that the permittee cannot commence work			

in waters of the United States until the district engineer approves the final mitigation plan, unless the district engineer determines that such a special condition is not practicable and not necessary to ensure timely completion of the required compensatory mitigation. To the extent appropriate and practicable, special conditions of the general permit verification should also address the requirements of paragraph (k)(2) of this section. (4) If a mitigation bank or in-lieu fee program is used to provide the required compensatory mitigation, the special conditions must indicate whether a mitigation bank or in-lieu fee program will be used and specify the number and resource type of credits the permittee is required to secure. In the case of an individual permit, the special condition must also identify the specific mitigation bank or in-lieu fee program that will be used. For general permit verifications, the special conditions may either identify the specific mitigation bank or in-lieu fee program, or state that the specific mitigation bank or in-lieu fee program used to provide the required			

compensatory mitigation must be approved by the district engineer before the credits are secured. (l) Party responsible for compensatory mitigation (1) For permittee-responsible mitigation, the special conditions of the DA permit must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project. (2) For mitigation banks and in-lieu fee programs, the instrument must clearly indicate the party or parties responsible for the implementation, performance, and long-term management of the compensatory mitigation project(s). The instrument must also contain a provision expressing the sponsor's agreement to assume responsibility for a permittee's compensatory mitigation requirements, once that permittee has secured the appropriate number and resource type of credits from the sponsor and the district engineer has received the documentation described in paragraph (l)(3) of this section. (3) If use of a mitigation bank or in-lieu fee program is approved by the district engineer to provide			

part or all of the required compensatory mitigation for a DA permit, the permittee retains responsibility for providing the compensatory mitigation until the appropriate number and resource type of credits have been secured from a sponsor and the district engineer has received documentation that confirms that the sponsor has accepted the responsibility for providing the required compensatory mitigation. This documentation may consist of a letter or form signed by the sponsor, with the permit number and a statement indicating the number and resource type of credits that have been secured from the sponsor. Copies of this documentation will be retained in the administrative records for both the permit and the instrument. If the sponsor fails to provide the required compensatory mitigation, the district engineer may pursue measures against the sponsor to ensure compliance.

(m) Timing. Implementation of the compensatory mitigation project shall be, to the maximum extent practicable, in advance of or concurrent with the activity causing the authorized impacts. The district engineer shall

require, to the extent appropriate and practicable, additional compensatory mitigation to offset temporal losses of aquatic functions that will result from the permitted activity.

Financial assurances

(n) (1) The district engineer shall require sufficient financial assurances to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with applicable performance standards. In cases where an alternate mechanism is available to ensure a high level of confidence that the compensatory mitigation will be provided and maintained (e.g., a formal, documented commitment from a government agency or public authority) the district engineer may determine that financial assurances are not necessary for that compensatory mitigation project.

(2) The amount of the required financial assurances must be determined by the district engineer, in consultation with the project sponsor, and must be based on the size and complexity of the compensatory mitigation project, the degree of completion of the project at the time of

project approval, the likelihood of success, the past performance of the project sponsor, and any other factors the district engineer deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments, subject to the approval of the district engineer. The rationale for determining the amount of the required financial assurances must be documented in the administrative record for either the DA permit or the instrument. In determining the assurance amount, the district engineer shall consider the cost of providing replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction, and monitoring. (3) If financial assurances are required, the DA permit must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity. (4) Financial assurances shall be phased out once the			

compensatory mitigation project has been determined by the district engineer to be successful in accordance with its performance standards. The DA permit or instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions. (5) A financial assurance must be in a form that ensures that the district engineer will receive notification at least 120 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated. (6) Financial assurances shall be payable at the direction of the district engineer to his designee or to a standby trust agreement. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid			

by the financial assurance provider shall be deposited directly into the standby trust fund for distribution by the trustee in accordance with the district engineer's instructions. (o) Compliance with applicable law. The compensatory mitigation project must comply with all applicable federal, state, and local laws. The DA permit, mitigation banking instrument, or in-lieu fee program instrument must not require participation by the Corps or any other federal agency in project management, including receipt or management of financial assurances or long-term financing mechanisms, except as determined by the Corps or other agency to be consistent with its statutory authority, mission, and priorities.			

§ 230.94 Planning and documentation.

(a) Pre-application consultations. Potential applicants for standard permits are encouraged to participate in pre-application meetings with the Corps and appropriate agencies to discuss potential mitigation requirements and information needs. (b) Public review and comment (1) For an activity that requires a standard DA permit pursuant to			

section 404 of the Clean Water Act, the public notice for the proposed activity must contain a statement explaining how impacts associated with the proposed activity are to be avoided, minimized, and compensated for. This explanation shall address, to the extent that such information is provided in the mitigation statement required by 33 CFR 325.1(d)(7), the proposed avoidance and minimization and the amount, type, and location of any proposed compensatory mitigation, including any out-of-kind compensation, or indicate an intention to use an approved mitigation bank or in-lieu fee program. The level of detail provided in the public notice must be commensurate with the scope and scale of the impacts. The notice shall not include information that the district engineer and the permittee believe should be kept confidential for business purposes, such as the exact location of a proposed mitigation site that has not yet been secured. The permittee must clearly identify any information being claimed as confidential in the mitigation statement when submitted. In such cases, the			

notice must still provide enough information to enable the public to provide meaningful comment on the proposed mitigation.
(2) For individual permits, district engineers must consider any timely comments and recommendations from other federal agencies; tribal, state, or local governments; and the public. (3) For activities authorized by letters of permission or general permits, the review and approval process for compensatory mitigation proposals and plans must be conducted in accordance with the terms and conditions of those permits and applicable regulations including the applicable provisions of this part.
(c) Mitigation plan
(1) Preparation and approval
(i) For individual permits, the permittee must prepare a draft mitigation plan and submit it to the district engineer for review. After addressing any comments provided by the district engineer, the permittee must prepare a final mitigation plan, which must be approved by the district engineer prior to issuing the individual permit. The approved final mitigation plan must be incorporated into the individual

permit by reference. The final mitigation plan must include the items described in paragraphs (c)(2) through (c)(14) of this section, but the level of detail of the mitigation plan should be commensurate with the scale and scope of the impacts. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and the name of the specific mitigation bank or in-lieu fee program to be used.
(ii) For general permits, if compensatory mitigation is required, the district engineer may approve a conceptual or detailed compensatory mitigation plan to meet required time frames for general permit verifications, but a final mitigation plan incorporating the elements in

paragraphs (c)(2) through (c)(14) of this section, at a level of detail commensurate with the scale and scope of the impacts, must be approved by the district engineer before the permittee commences work in waters of the United States. As an alternative, the district engineer may determine that it would be more appropriate to address any of the items described in paragraphs (c)(2) through (c)(14) of this section as permit conditions, instead of components of a compensatory mitigation plan. For permittees who intend to fulfill their compensatory mitigation obligations by securing credits from approved mitigation banks or in-lieu fee programs, their mitigation plans need include only the items described in paragraphs (c)(5) and (c)(6) of this section, and either the name of the specific mitigation bank or in-lieu fee program to be used or a statement indicating that a mitigation bank or in-lieu fee program will be used (contingent upon approval by the district engineer). (iii) Mitigation banks and in-lieu fee programs must prepare a mitigation plan including the items in paragraphs (c)(2) through			

(c)(14) of this section for each separate compensatory mitigation project site. For mitigation banks and in-lieu fee programs, the preparation and approval process for mitigation plans is described in §230.98. (2) Objectives. A description of the resource type(s) and amount(s) that will be provided, the method of compensation (i.e., restoration, establishment, enhancement, and/or preservation), and the manner in which the resource functions of the compensatory mitigation project will address the needs of the watershed, ecoregion, physiographic province, or other geographic area of interest. (3) Site selection. A description of the factors considered during the site selection process. This should include consideration of watershed needs, on-site alternatives where applicable, and the practicability of accomplishing ecologically self-sustaining aquatic resource restoration, establishment, enhancement, and/or preservation at the compensatory mitigation project site. (See §230.93(d).) (4) Site protection instrument. A description of the legal arrangements and instrument,			

including site ownership, that will be used to ensure the long-term protection of the compensatory mitigation project site (see §230.97(a)). (5) Baseline information. A description of the ecological characteristics of the proposed compensatory mitigation project site and, in the case of an application for a DA permit, the impact site. This may include descriptions of historic and existing plant communities, historic and existing hydrology, soil conditions, a map showing the locations of the impact and mitigation site(s) or the geographic coordinates for those site(s), and other site characteristics appropriate to the type of resource proposed as compensation. The baseline information should also include a delineation of waters of the United States on the proposed compensatory mitigation project site. A prospective permittee planning to secure credits from an approved mitigation bank or in-lieu fee program only needs to provide baseline information about the impact site, not the mitigation bank or in-lieu fee project site. (6) Determination of credits. A description of the number of			

credits to be provided, including a brief explanation of the rationale for this determination. (See §230.93(f).) (i) For permittee-responsible mitigation, this should include an explanation of how the compensatory mitigation project will provide the required compensation for unavoidable impacts to aquatic resources resulting from the permitted activity. (ii) For permittees intending to secure credits from an approved mitigation bank or in-lieu fee program, it should include the number and resource type of credits to be secured and how these were determined. (7) Mitigation work plan. Detailed written specifications and work descriptions for the compensatory mitigation project, including, but not limited to, the geographic boundaries of the project; construction methods, timing, and sequence; source(s) of water, including connections to existing waters and uplands; methods for establishing the desired plant community; plans to control invasive plant species; the proposed grading plan, including elevations and slopes of the substrate; soil management; and			

erosion control measures. For stream compensatory mitigation projects, the mitigation work plan may also include other relevant information, such as planform geometry, channel form (e.g., typical channel cross-sections), watershed size, design discharge, and riparian area plantings. (8) Maintenance plan. A description and schedule of maintenance requirements to ensure the continued viability of the resource once initial construction is completed. (9) Performance standards. Ecologically-based standards that will be used to determine whether the compensatory mitigation project is achieving its objectives. (See §230.95.) (10) Monitoring requirements. A description of parameters to be monitored in order to determine if the compensatory mitigation project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results to the district engineer must be included. (See §230.96.) (11) Long-term management plan. A description of how the compensatory mitigation project will be managed after			

performance standards have been achieved to ensure the long-term sustainability of the resource, including long-term financing mechanisms and the party responsible for long-term management. (See §230.97(d).) (12) Adaptive management plan. A management strategy to address unforeseen changes in site conditions or other components of the compensatory mitigation project, including the party or parties responsible for implementing adaptive management measures. The adaptive management plan will guide decisions for revising compensatory mitigation plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect compensatory mitigation success. (See §230.97(c).) (13) Financial assurances. A description of financial assurances that will be provided and how they are sufficient to ensure a high level of confidence that the compensatory mitigation project will be successfully completed, in accordance with its performance standards (see §230.93(n)).			

(14) Other information. The district engineer may require additional information as necessary to determine the appropriateness, feasibility, and practicability of the compensatory mitigation project.			

§ 230.95 Ecological performance standards.

(a) The approved mitigation plan must contain performance standards that will be used to assess whether the project is achieving its objectives. Performance standards should relate to the objectives of the compensatory mitigation project, so that the project can be objectively evaluated to determine if it is developing into the desired resource type, providing the expected functions, and attaining any other applicable metrics (e.g., acres). (b) Performance standards must be based on attributes that are objective and verifiable. Ecological performance standards must be based on the best available science that can be measured or assessed in a practicable manner. Performance standards may be based on variables or measures of functional capacity described in functional assessment			

methodologies, measurements of hydrology or other aquatic resource characteristics, and/or comparisons to reference aquatic resources of similar type and landscape position. The use of reference aquatic resources to establish performance standards will help ensure that those performance standards are reasonably achievable, by reflecting the range of variability exhibited by the regional class of aquatic resources as a result of natural processes and anthropogenic disturbances. Performance standards based on measurements of hydrology should take into consideration the hydrologic variability exhibited by reference aquatic resources, especially wetlands. Where practicable, performance standards should take into account the expected stages of the aquatic resource development process, in order to allow early identification of potential problems and appropriate adaptive management.			

§ 230.95 Ecological performance standards.

(a) General. (1) Monitoring the compensatory mitigation project site is necessary to determine if the project is meeting its			

performance standards, and to determine if measures are necessary to ensure that the compensatory mitigation project is accomplishing its objectives. The submission of monitoring reports to assess the development and condition of the compensatory mitigation project is required, but the content and level of detail for those monitoring reports must be commensurate with the scale and scope of the compensatory mitigation project, as well as the compensatory mitigation project type. The mitigation plan must address the monitoring requirements for the compensatory mitigation project, including the parameters to be monitored, the length of the monitoring period, the party responsible for conducting the monitoring, the frequency for submitting monitoring reports to the district engineer, and the party responsible for submitting those monitoring reports to the district engineer. (2) The district engineer may conduct site inspections on a regular basis (e.g., annually) during the monitoring period to evaluate mitigation site performance.			

(b) Monitoring period. The mitigation plan must provide for a monitoring period that is sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years. A longer monitoring period must be required for aquatic resources with slow development rates (e.g., forested wetlands, bogs). Following project implementation, the district engineer may reduce or waive the remaining monitoring requirements upon a determination that the compensatory mitigation project has achieved its performance standards. Conversely the district engineer may extend the original monitoring period upon a determination that performance standards have not been met or the compensatory mitigation project is not on track to meet them. The district engineer may also revise monitoring requirements when remediation and/or adaptive management is required. (c) Monitoring reports. (1) The district engineer must determine the information to be included in monitoring reports. This information must be sufficient for			

the district engineer to determine how the compensatory mitigation project is progressing towards meeting its performance standards and may include plans (such as as-built plans), maps, and photographs to illustrate site conditions. Monitoring reports may also include the results of functional, condition, or other assessments used to provide quantitative or qualitative measures of the functions provided by the compensatory mitigation project site. (2) The permittee or sponsor is responsible for submitting monitoring reports in accordance with the special conditions of the DA permit or the terms of the instrument. Failure to submit monitoring reports in a timely manner may result in compliance action by the district engineer. (3) Monitoring reports must be provided by the district engineer to interested federal, tribal, state, and local resource agencies, and the public, upon request.			

§ 230.97 Management.

(a) Site protection. (1) The aquatic habitats, riparian areas, buffers, and uplands that comprise the overall compensatory mitigation project			

must be provided long-term protection through real estate instruments or other available mechanisms, as appropriate. Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as federal, tribal, state, or local resource agencies, non-profit conservation organizations, or private land managers; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through federal facility management plans or integrated natural resources management plans. When approving a method for long-term protection of non-government property other than transfer of title, the district engineer shall consider relevant legal constraints on the use of conservation easements and/or restrictive covenants in determining whether such mechanisms provide sufficient site protection. To provide sufficient site protection, a conservation easement or restrictive covenant should, where practicable, establish in an appropriate third party (e.g., governmental or non-profit			

resource management agency) the right to enforce site protections and provide the third party the resources necessary to monitor and enforce these site protections. (2) The real estate instrument, management plan, or other mechanism providing long-term protection of the compensatory mitigation site must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (e.g., fishing or grazing rights) may be used. (3) The real estate instrument, management plan, or other long-term protection mechanism must contain a provision requiring 60-day advance notification to the district engineer before any action is taken to void or modify the instrument, management plan, or long-term protection mechanism, including transfer of title to, or establishment of any other legal claims over, the compensatory mitigation site. (4) For compensatory mitigation projects on public lands, where Federal facility management			

plans or integrated natural resources management plans are used to provide long-term protection, and changes in statute, regulation, or agency needs or mission results in an incompatible use on public lands originally set aside for compensatory mitigation, the public agency authorizing the incompatible use is responsible for providing alternative compensatory mitigation that is acceptable to the district engineer for any loss in functions resulting from the incompatible use.

(5) A real estate instrument, management plan, or other long-term protection mechanism used for site protection of permittee-responsible mitigation must be approved by the district engineer in advance of, or concurrent with, the activity causing the authorized impacts.

(b) Sustainability. Compensatory mitigation projects shall be designed, to the maximum extent practicable, to be self-sustaining once performance standards have been achieved. This includes minimization of active engineering features (e.g., pumps) and appropriate siting to ensure that natural hydrology and landscape context will support

long-term sustainability. Where active long-term management and maintenance are necessary to ensure long-term sustainability (e.g., prescribed burning, invasive species control, maintenance of water control structures, easement enforcement), the responsible party must provide for such management and maintenance. This includes the provision of long-term financing mechanisms where necessary. Where needed, the acquisition and protection of water rights must be secured and documented in the permit conditions or instrument.

(c) Adaptive management. (1) If the compensatory mitigation project cannot be constructed in accordance with the approved mitigation plans, the permittee or sponsor must notify the district engineer. A significant modification of the compensatory mitigation project requires approval from the district engineer.

(2) If monitoring or other information indicates that the compensatory mitigation project is not progressing towards meeting its performance standards as anticipated, the responsible party must notify the district engineer as soon as

possible. The district engineer will evaluate and pursue measures to address deficiencies in the compensatory mitigation project. The district engineer will consider whether the compensatory mitigation project is providing ecological benefits comparable to the original objectives of the compensatory mitigation project. (3) The district engineer, in consultation with the responsible party (and other federal, tribal, state, and local agencies, as appropriate), will determine the appropriate measures. The measures may include site modifications, design changes, revisions to maintenance requirements, and revised monitoring requirements. The measures must be designed to ensure that the modified compensatory mitigation project provides aquatic resource functions comparable to those described in the mitigation plan objectives. (4) Performance standards may be revised in accordance with adaptive management to account for measures taken to address deficiencies in the compensatory mitigation project. Performance standards may also be revised to reflect changes in management			

strategies and objectives if the new standards provide for ecological benefits that are comparable or superior to the approved compensatory mitigation project. No other revisions to performance standards will be allowed except in the case of natural disasters. (d) Long-term management. (1) The permit conditions or instrument must identify the party responsible for ownership and all long-term management of the compensatory mitigation project. The permit conditions or instrument may contain provisions allowing the permittee or sponsor to transfer the long-term management responsibilities of the compensatory mitigation project site to a land stewardship entity, such as a public agency, non-governmental organization, or private land manager, after review and approval by the district engineer. The land stewardship entity need not be identified in the original permit or instrument, as long as the future transfer of long-term management responsibility is approved by the district engineer. (2) A long-term management plan should include a description of long-term management needs,			

annual cost estimates for these needs, and identify the funding mechanism that will be used to meet those needs. (3) Any provisions necessary for long-term financing must be addressed in the original permit or instrument. The district engineer may require provisions to address inflationary adjustments and other contingencies, as appropriate. Appropriate long-term financing mechanisms include non-wasting endowments, trusts, contractual arrangements with future responsible parties, and other appropriate financial instruments. In cases where the long-term management entity is a public authority or government agency, that entity must provide a plan for the long-term financing of the site. (4) For permittee-responsible mitigation, any long-term financing mechanisms must be approved in advance of the activity causing the authorized impacts.			

§ 230.98 Mitigation banks and in-lieu programs.

Mitigation banks and in-lieu programs	NA for state program		

Commented [PB31]: Delete?Eric thought maybe we wouldn't include this section? I can cut and paste from the DOJ doc easily enough, many pages

DRAFT